SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 111

JULIUS ROSENBERG AND ETHEL ROSENBERG,
Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, Julius Rosenberg and Ethel Rosenberg, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered February 25, 1952 (R. 1640), rehearing denied April 8, 1952 (R. 1709), affirming judgments in the District Court for the Southern District of New York, convicting the petitioners of conspiracy to violate Section 32(a) of the United States Code (now 18 U. S. C. 794), and imposing upon them the sentence of death (R. 27, 28).

Opinion Below

The opinion of the Court of Appeals appears in the record at R. 1640 and R. 1709. It is reported in 195 F. 2d 583.

Summary Statement of the Matter Involved

The petitioners were convicted, together with Morton Sobell, a co-defendant, of having conspired with Anatoli Yakovlev, a Soviet national, Harry Gold, and David and Ruth Greenglass, during World War II and for some years thereafter, to transmit information "relating to the national defense" to the Soviet Union, with the intention to advantage that nation, although not to injure the United States (R. 2-4, 27, 28, 30).

The trial was severed as to the defendant Yakovlev (R. 41), who had left the United States in 1946 to return to his native land, under circumstances which negative flight (R. 945-47), and as to David Greenglass (R. 175-76), upon his plea of guilty to this indictment. Harry Gold and Ruth Greenglass, named as co-conspirators, were not named as co-defendants (R. 2-4).

The record demonstrates that this case posed a delicate balance between guilt and innocence. The framework of the dragnet conspiracy indictment was filled in by accomplice testimony, held together by a few thin strands of circumstantial evidence. Counterposed against the cohesive defense of the petitioners, there was presented a close issue of fact for the determination of the jury, which could have returned, with reason, a verdict of acquittal.

The petitioners, Julius Rosenberg and his wife, Ethel, in their early thirties, are the parents of young sons of five and nine (R. 1051-52, 1295). They were educated in the public school systems of New York City and were graduated into the routine of earning a livelihood for themselves, and upon marriage, for their family (R. 1052-63, 1294-1307). The anonymity of the commonplaces of work, child-rearing, and civic obligations (R. 1306) clothed them until the charges herein cast them into the glare of public note.

The main concern of the prosecution was the theft of atomic-bomb information stolen from the Los Alamos Project and siphoned to the Soviet Union.

The case burst upon the public in 1950, when the relations between the Soviet Union and the United States, strained over the course of the preceding years, had reached a critical stage. The arrests compounded the shock to the national mind which had been publicly informed the year before that the Soviet Union had mastered the "know-how" of the atomic bomb.

In this supercharged atmosphere, the mere accusation was enough to arouse the deepest passions and hostility against these petitioners. Their pleas of not guilty and the concomitant presumption of innocence were further burdened by the prosecution's advertisement of a proposed showing of their overwhelming guilt.

The prosecution heralded one hundred and thirteen names on its panel of witnesses. There were included: (1) world renowned atomic scientists; (2) F. B. I. agents responsible for the investigation of the case; (3) friends of the petitioners, purportedly their cohorts in Soviet spying activities (R. 51-52).

The alembic of careful scrutiny reduces to insubstantiality the pretensions of the invulnerability of the Government's presentation. None of the above groupings was called to testify at the trial. Not one iota of evidence, except the accomplice testimony of David Greenglass and Ruth Greenglass, his wife, was introduced to prove the participation of the petitioners in the main matter of the charge or even their presence at the places where these accomplices asserted the conspiracy was hatched or furthered.

"Doubtless", as the Court below correctly perceived, "if [the Greenglass] testimony were disregarded, the conviction could not stand." (R. 1648).

The general unreliability of accomplice testimony is confirmed by the nature and character of the Greenglasses' story.

David Greenglass is the youngest brother of Ethel Rosenberg (R. 395, 1294). He is a self-confessed espionage agent (R. 425-29, 438-66, 489-500), whose illicit activities during his army career, brought cash returns (R. 450, 459, 496, 705, 722-26).

Ruth Greenglass is also an admitted spy (R. 678-705), who knowingly appropriated the venal fruits of her husband's criminality (R. 681, 701-02, 705, 710, 713, 721-26, 732).

Trapped, both co-operated with[1] and testified for the Government, actuated either by hope and desire or by design to avoid or mitigate punishment for their malefactions (R. 556-67, 594-608, 715-21, 729-47, 757-61, 780, 784-86, 792-93). Their objective was achieved. Ruth was immunized from prosecution and is, as always, a free woman (R. 593, 740). Upon his plea of guilty, David obtained a trial severance and was awaiting sentence at the time of trial. Eventually he received a comparatively lenient sentence of 15 years (R. 1638).

Ruth and David Greenglass related their complicity in a Soviet espionage conspiracy to secure and transmit infor-

[1] There were different versions as to the time of David Greenglass' conversion to concord with the government. Greenglass testified his co-operation commenced immediately upon his apprehension (R. 577-78). The prosecutor disclosed, for the first time, on the day of Greenglass' sentence, which occurred after the conviction and sentence of the Rosenbergs, that Greenglass' co-operation came only after O. John Rogge, his counsel, entered into negotiations between the Greenglasses and the Government (R. 1623, 1628-29). Had the prosecutor been as candid at the trial as on Greenglass' sentence, the defense could have been enabled to inspect and introduce in evidence his first written statements to the authorities belying his alleged co-operation, and thus lay before the jury important impeaching evidence. In any event, the prosecutor's conduct is questionable under *Berger* v. *United States*, 295 U.S. 78 (1935).

mation concerning the atom-bomb being constructed at the Los Alamos army installation at which he was stationed as a soldier machinist. Their self-involvement was corroborated by oral (R. 821-31) and documentary evidence (G. E.: 5, 9A & B, 16, 17). Their accusations, however, that Ethel Rosenberg and Julius, her husband, were similarly implicated, and, indeed moved them to join this illegal combine are without any corroboration and lack persuasiveness.

The record, in baring David Greenglass' ready knowledge of restricted information at the precise moment of the enlistment of his espionage services, at least, makes equivocal the Greenglasses' claim to seduction by the Rosenbergs (G. E.: 1, 19, 20, R. 398-99, 405-12, 879-902). Their strain to temper their voluntary confederation in spying, and to assume the role of pawns in the hands of the Rosenbergs, in a conspectus of acts which speak more eloquently to the contrary, invites skepticism (R. 424-25, 496, 538-39, 553, 679-80, 682-83, 703, 711, 715-21).[2]

The trustworthiness of their evidence to prove the Rosenbergs' culpability is further attenuated by the singular circumstance that they laid the incriminating episodes to conversations solely between themselves and the Rosenbergs. Thus, this testimony, the heart of the Government's case, was placed beyond the pale of test by the normally comparative standards of independent corroboration.

The spy plot unfolded by the Greenglasses, Ruth corroborating David with studied rehearsal (R. 682-83, 727-28), is predicated upon the following recital. (1) In November, 1944, prior to her departure to visit David at his station in

[2] Within a week of the sentence of the Rosenbergs, a highly authoritative government report rated David Greenglass among the foremost atomic espionage agents, and subordinated the Rosenbergs to a minor place. *Report on Soviet Atomic Espionage*, Joint Comm. on Atomic Energy 82nd Cong., 1st Sess. (U.S. Gov't. Printing Office, 1951) p. 7. *Accord: The Shameful Years*, House Comm. on Un-Am. Activities (U.S. Gov't Printing Office, 1952).

New Mexico, Ruth was solicited by the Rosenbergs to induce David to transmit specific information concerning the Los Alamos project: "location, personnel, physical description, security measures, camouflage and experiments" (R. 678-81). Ruth was asked to memorize the data and, on return, relay the information to Julius Rosenberg for ultimate transmittal to the Soviet Union (R. 426). At Albuquerque, David, after an ephemeral refusal, gave Ruth the requested data, readily known to him despite its secrecy (R. 423-27, 683-85). (2) In January, 1945, David, on furlough, delivered to Julius Rosenberg in New York a fuller written report on the project, including a sketch of a lens mold used in the atomic experimentations (R. 428-29, 438-39, 686). (3) A few nights later, the Greenglasses were introduced to a Mrs. Sidorovich at a social visit to the Rosenberg home. After the departure of this woman, when the Greenglasses and the Rosenbergs were alone with each other, Julius described her as a potential courier to collect information from David in New Mexico. To perfect identification of the actual messenger, the side of a Jello-box was cut into two parts, one part of which was kept by Ruth and the other, retained by Julius, was to be on the person of the emissary (R. 443-50, 686-90). At this meeting, Ethel admitted she aided Julius in his espionage work as a typist (R. 450-51, 690-91). (4) In June, 1945, Harry Gold arrived at the Greenglass apartment in Albuquerque with the salutation "I come from Julius" and produced a portion of the side of a Jello-box that matched the one kept by Ruth (R. 455-57, 699-700, 825). Gold testified his part of the side was given to him by his Soviet superior, Yakovlev (R. 822). David delivered to Gold information about personnel at the project who were potential recruits for espionage and another sketch of a section of the lens mold, indicating the principles of implosion used in this phase of bomb con-

struction (R. 459, 828). (5) In September, 1945, on another furlough in New York, David turned over to Julius a sketch of the cross-section of the atom-bomb and a 12-page exposition covering the functions of its component parts,[3] both of which, despite his stunted educational background (R. 610-15), he claims to have composed from memory of scraps of oral information gleaned at the project (R. 493, 495-98, 609, 613, 619-21).[4] While Ethel typed the material, Julius confided he had pilfered a proximity fuse for the Soviet Union from a factory at which he was employed (R. 510). (6) In the post-war years, Julius and David were co-entrepreneurs in the machine shop business (R. 514, 708-09). In the course of this relationship, and in sharp contrast to the acrimony that had developed between Julius and the Greenglasses, David described himself as the repository of Julius' confidences that he still was active on behalf of the Soviet Union and had been rewarded for his efforts by gifts and a certificate from the Soviet Government granting him special privileges in Russia (R. 514-23). (7) In 1950, after the arrest, in England, of Dr. Klaus Fuchs, an English scientist, accused of stealing atom-bomb information at Los Alamos for the Soviet Union, Julius urged David to flee the country and promised to subsidize the flight (R. 523). Julius renewed his imprecations after Gold's arrest and with a clairvoyance that jars the sophisticated mind predicted that David "would be . . . picked up between June 12th and June 16th" (R. 525-26, 709). [David was arrested on June 15, 1950 (R. 567).] He gave David $1,000 to pre-

[3] This testimony was impounded by the trial court (R. 499) but may be brought before this Court at its request.

[4] That there is incredulity about this scientific evidence is attested by the critiques of scientists appearing since the termination of the trial. *See: Life*, March 26, 1951, p. 51; *Scientific American*, May, 1951, p. 33. The Government itself doubts its reliability by questioning the likelihood of David's having transmitted anything of substantial value. *Report on Soviet Atomic Espionage, supra.*

pare for the journey, adding that he and his family were likewise intending to escape (R. 526, 529, 710, 713). When they accepted the $1,000, David and Ruth had already decided to remain in the country and co-operate with the Government (R. 711). Their subsequent taking of family passport photos (R. 530-32, 711-12), suggesting their preparations for flight, indicates less their remorse and desire for atonement, than calculated maintenance of avenues for escape from retribution. About a week later, Julius primed David on flight plans and gave him an additional $4,000 for flight purposes (R. 532-33, 713). Their disingenuousness was more fully exposed by their sedulous secretion of the contraband $4,000 from the F. B. I. for their own use,[5] even after David's professed prompt confession (R. 732, 758-61, 794-97).

The lack of supporting oral testimony was not compensated by the quality of documentary corroboration. The exhibits relating to the crux of the conspiracy—the Jello-box, sketches of the lens mold, cross-sections of the atom-bomb (G. E.: 4A & B, 2, 6, 7, 8)—were replicas which were prepared for trail purpose by David after his arrest or during the trial (R. 439-41, 460-61, 463); they have no probative weight independent of the veracity of his parole testimony. The other exhibits were "puff," dealing with non-controverted matters.

The other Government evidence has already been relegated to insignificance by the Court below (R. 1648). This testimony follows:

Max Elitcher, a Navy Department engineer and a casual acquaintance of Julius Rosenberg in college days, testified Rosenberg attempted, on several occasions, to interest him in espionage. The initial overture is alleged to have been

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[5] This $4,000 was given to O. John Rogge, the attorney for the Greenglasses, as a fee, the day after David's apprehension (R. 732, 794).

made directly within a few minutes of a visit, the first communication between them in six years (R. 214, 296-99). His continued wooing of Elitcher over a period of four years, is likewise improbable in the face of the admitted facts that Elitcher never promised to pass nor ever passed any information to anyone (R. 243, 251-52, 256-58, 276, 353-60). Elitcher's pliant obeisance to officialdom and his resultant trial testimony is illumined by the witness' admission of fear, bordering on panic, when the authorities implied the presentation against him of espionage and well-founded perjury charges (R. 277-83, 361). His hope for immunity was rooted in reality; he was never prosecuted for any crime (R. 292-96, 346-47).

Elizabeth Bentley, a notorious and self-styled Soviet agent unconnected with the instant alleged conspiracy, supplied testimony, whose legal purport is still obscure, that she received certain telephone calls in years prior to the inception of the charged conspiracy from a person who described himself as "Julius" (R. 991).

Harry Gold served to corroborate the enmeshment only of the Greenglasses (R. 821-31). His testimony reveals that he neither knew the Rosenbergs to be in the conspiracy, nor, indeed, that he had ever met them.

The ability of these subsidiary witnesses to corroborate, at all, the Rosenbergs' participation in the conspiracy charged, was dependent on resort to flimsy circumstantial evidence. The accomplice, Gold, who had direct contact with the "Russians", could supply the sole link of the Rosenbergs with them, only by the inference from the wanderings of one side of the Jello-box (R. 822). Neither Gold nor Bentley knew the actual person to whom they referred as "Julius" (R. 817-45, 964-1024). The proposition which the prosecution advanced that it is inferrable from the identity of "Julius" with the given name of the petitioner,

Julius Rosenberg, that "Julius" was this petitioner, is negatived by the direct testimony of these same witnesses that the practice of trained and experienced spies, including themselves, was to take care to use assumed names (R. 815, 826, 985).

Evidence treating with the alleged political views and associations of the petitioners threaded the record and constrained the petitioners to put them in issue. This proof was urged and received on the theory that the "communist" character of the views and associations was relevant to show motive but was submitted to the jury solely on the requisite statutory intent "to advantage" the Soviet Union (R. 200-01, 218-22, 1022, 1558).

To lay the foundation for the admission of this evidence, the prosecution imported Elizabeth Bentley to double in brass. In stating her qualifications as an "expert", she spread before the jury her lurid career of an earlier period (R. 965-82). Only the unsavory details of her personal misdeeds make the connection, which was the design of this testimony, between membership in the Communist Party and militarily advantaging the Soviet Union (R. 965-82, 998, 1013-14). Her "expert" testimony is neither a generalization that extends the applicability of her experience to all Party members or a specification to reach the petitioners.

The Government, under the aegis of the trial court, made "communism" the whipping boy of the proceedings. It was featured in the prosecutor's opening (R. 180-82) and recurred, whether aptly or not, with unmitigated persistence, during the entire course of the trial (R. 189, 203-05, 215, 224-33, 240-42, 352-53, 414, 418-20, 423, 679, 789-91, 965-96, 1078-80, 1171, 1175, 1178-81, 1183-86, 1239, 1277, 1302-04, 1346-54, 1372). The Government, on this subject, following the tactic of re-asking questions already asked and answered (R. 1171, 1178-79, 1277, 1309), and pressing lines

of interrogation that it came to know would draw assertions of the Fifth Amendment privilege, which, when raised, went unchallenged (R. 1160-65, 1175, 1183-92, 1277, 1303-05, 1309, 1353-54, 1371), displayed a seemingly greater interest in asking the questions than in receiving the answer. In his summation, the prosecutor again invoked "communism" to bind his fragmented evidentiary structure (R. 1515, 1516, 1517, 1519, 1520, 1528, 1529, 1530, 1531, 1533, 1535), and, on this behalf, excoriated the petitioners as "traitors" (R. 1517, 1518, 1535).

The Court below acknowledged that "such evidence can be highly inflammatory in a jury trial. This Court and others have recognized that the Communist label yields marked ill-will for its American wearer" (R. 1655-56). It further noted that the admonition of the trial judge to the jury "not to determine guilt or innocence of a defendant on whether or not he is a Communist" might be "no more than an empty ritual without any practical effect upon the jurors . . ." (R. 1656). Indeed, the persistent intrusion of this "communist" evidence along with the evidence on the substantive charge makes it difficult to determine whether the verdict was the product of a sober estimation of the Rosenbergs' culpability or a triumph of political prejudice.

The Rosenbergs testified in their own defense. They denied, generally, and in detail, every part of the evidence introduced by the Government to connect them with a conspiracy to commit espionage (R. 1051-1159, 1281-82, 1293-1307, 1311-44). They showed that, during the years in question, they lived a steady, normal existence (R. 1052-63, 1294-1307). Even as late as May, 1950, during the period when the Government claimed the Rosenbergs were preparing for flight, Julius depleted his meager cash reserves and obligated himself, on a long term basis, to buy out the holder of the preferred stock of the business in which he was en-

gaged, to gain its absolute ownership and control (R. 1117-18, 1142-43).

Ethel, upon the birth of their two sons, ceased her outside employment, and discharged the responsibility of mother and housewife (R. 1296, 1304-07). Julius, a graduate engineer, held a regular succession of low-salaried positions until his entrance into the machine shop enterprise with David Greenglass (R. 1052-63). The modesty of their standard of living, bordering often on poverty (R. 1052-58, 1113, 1118, 1297-1302), discredits David's depiction of Julius as the pivot and pay-off man of a widespread criminal combination, fed by a seemingly limitless supply of "Moscow gold" (R. 514-23, 526, 529, 710, 713).

Their knowledge of the existence of an atom-bomb came with its explosion at Hiroshima, and David's connection with it at Los Alamos, resulted from his revelations on his discharge from the Army in 1946 (R. 1066-71, 1312, 1332-36).

They knew neither Gold nor Yakovlev, their alleged co-conspirators, nor Bentley (R. 1073, 1091, 1095-96, 1523)—facts which the Government did not controvert.

Their relations with Sobell, their co-defendant, were confined to sporadic social visits (R. 1146-49, 1157). Following a complete six-year break, after graduation from college, their ties with Elitcher assumed similar, but even more tenuous, character (R. 1148-59).

Their relationship with the Greenglasses, both during and after the war, was on a purely familiar and social level (R. 1067-68, 1084, 1103-04, 1322-23), the cordiality becoming strained to the breaking, however, with the advent of bitter quarrels which arose in the course of their post-war business ties (R. 1119-20).

In 1950, Julius was negotiating to purchase David's stock in their co-enterprise (R. 1113-18), David having abandoned active participation in the business a few months before

(R. 1113). The bargaining was heated and protracted (R. 1113-18). Finally, in May, the parties arrived at an understanding. The stock was assigned and the purchase price was fixed, although the time of its payment appears to have remained in dispute (R. 1115). In the middle of May, David, agitated, asked Julius for a few thousand dollars. When Julius refused because his debt on the purchase price of the stock was not due and because, in any event, he did not have the money, David asked Julius, as an alternative, to procure a small-pox vaccination certificate from his doctor and to ascertain the injections required to enter Mexico (R. 1118-19).

Rebuffed by David in his inquiries about the source of David's apparent troubles, Julius, remembering Ruth's concern in the war years that David had stolen things from the Army, attributed David's plight to this account (R. 1120-21, 1334). The pull of family ties prevailed over the strained relationship, and Julius felt under moral obligation to lend comfort to David (R. 1120, 1127-28). Julius found out from his doctor the information about travel to Mexico but was unsuccessful in obtaining the desired certificate (R. 1123). David, so informed by Julius, stated he himself would take care of the matter (R. 1125).

Near the end of May or early June, David, in a more agitated state, repeated his request of Julius for a "couple" of thousand dollars, and, when Julius refused, told him "You are going to be sorry" (R. 1128-30). In short, no monies were given to David for flight or any other purposes (R. 1100-03). Nor did Julius or Ethel make any preparation to flee this country. Julius continued to conduct his business in a normal way and the pedestrian routine of living of the Rosenberg family continued even to the day of their arrest (R. 1142-43).

The sharpness and closeness of the factual issues necessi-

tate a resolution of the questions as to whether or not the conviction of the petitioners was secured with due process and with that scrupulous fairness to which they were entitled and urge review by this Court.

At the opening of the trial, motions were made by the petitioners to dismiss the indictment on constitutional grounds and for failure to state a crime (R. 160-71). At the close of the government's case, these motions to the indictment were renewed (R. 1040-41); further motions were made for a mistrial on the ground of the admission of improper and prejudicial evidence (R. 1037-40), as well as a motion for acquittal (R. 1051). All were denied (R. 173-74, 1040-41, 1051). At the close of the trial, the petitioners reasserted each of these motions (R. 1441-46), and prayed for the additional relief (1) that a mistrial be granted on the ground that the judge's conduct had deprived them of a fair and impartial trial (R. 1442); and (2) that the testimony of the witness Schneider be stricken from the record (R. 1446). Each of these motions was denied (R. 1442, 1443, 1446). During the entire trial, questions concerning the admission and exclusion of evidence were raised by numerous objections and motions to strike.

Immediately prior to sentence, motions in arrest of judgment and for a new trial were interposed on all of the grounds heretofore set forth (R. 1586), and denied (R 1586).

Jurisdiction

The judgment of the Court of Appeals was entered on February 25, 1952, rehearing denied April 8, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254. By order of Mr. Justice JACKSON, of April 30, 1952, the time to file this petition was extended to and including June 7, 1952 (R. 1714-15).

Statute Involved

The indictment was founded upon Section 32(a) and 34 of Title 50 of the United States Code.

Section 32 (a) provides:

> "Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers or transmits, or attempts to, or aids or induces another to, communicate, deliver or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, codebook, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided* that whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; . . . ."

Section 34 provides:

> "If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of title 18."

Sections 32 and 34 were combined and revised, and now constitute and are replaced by Section 794 of Title 18 of the United States Code (effective June 25, 1948).

Questions Presented

1. Whether Sections 32(a) and 34 of Title 50 of the United States Code, on their face and as construed, are so vague and indefinite, as to violate petitioners' rights under the First and Fifth Amendments.

2. Whether the indictment herein fails to state a crime in violation of petitioners' rights under the Sixth Amendment.

3. Whether the conviction of the petitioners rests on an evasion of the Constitutional provisions with regard to treason (Art. III, Sec. 3).

4. Whether the conduct of the trial judge deprived the petitioners of a fair trial in violation of the Fifth and Sixth Amendments, in that:

(a) by a course of conduct, he displayed bias against the petitioners and conveyed to the jury his belief in their guilt.

(b) by instructions to the jury, he licensed it to take into consideration factors outside of the evidence.

(c) by instruction or otherwise, he presented to the jury a one-sided and distorted view of the evidence.

5. Whether the admission of the following evidence deprived petitioners of their rights under the First, Fifth and Sixth Amendments:

(a) the admission of evidence of lawful opinions, as probative of an element of the crime, in violation of petitioners' rights under the First Amendment.

(b) the admission of evidence tending to establish petitioners' membership in an association, as, *per se*, probative of an element of the crime, in violation of petitioners' rights under the First Amendment.

(c) the admission of the evidence, set forth in (a) and (b) above, having no relevance other than to propensity to commit the crime charged, and being highly inflamma-

tory and prejudicial in nature, in violation of petitioners' right to a fair trial under the Fifth and Sixth Amendments.

(d) the admission of evidence tending to connect the petitioner, Julius Rosenberg, with "Soviet spies", unconnected with the crime charged, having no relevance other than to propensity to commit the crime charged, and being highly inflammatory and prejudicial in nature, in violation of the petitioners' right to a fair trial under the Fifth and Sixth Amendments.

(e) the admission of proof of the telephone conversations, tending to establish the connection in (d) above, absent a proper evidentiary foundation.

6. Whether the admission of testimony, highly prejudicial in nature, of a prosecution witness, not included in the mandatory list of witnesses, violated petitioners' rights under 18 U. S. C. Sec. 3432.

7. Whether the imposition of the sentence of death was "cruel and unusual" punishment, in violation of petitioners' rights under the Eighth Amendment.

Reasons Why the Writ Should Be Granted

The orthodox reasons for granting the writ of certiorari are present in this case. (1) The case involves important questions of Federal law which have not been, but should be settled by this Court. The petitioners' claim of invalidity of the statute under the First and Fifth Amendments raises questions not decided by this Court in *Gorin* v. *United States*, 312 U. S. 19 (1941), and their challenge to the conviction under the treason clause, and to the sentence under the Eighth Amendment have never before been either raised or decided by this Court. (2) The decision below is, also, inconsistent with applicable decisions of this Court. The decision of the Court below in relation to the sufficiency of the indictment is in probable conflict with an unbroken line of authority in this Court; the introduction of

evidence relating to "communist" beliefs and affiliations is inconsistent with the decisions of this Court in *Haupt* v. *United States*, 330 U. S. 631 (1947); *Schneiderman* v. *United States*, 320 U. S. 118 (1943); and *Michelson* v. *United States*, 335 U. S. 469 (1948). The admission of the Bentley testimony concerning the "Julius" telephone calls also conflicts with the *Michelson* case; and the allowance of the "Schneider" testimony is probably inconsistent with *Goldsby* v. *United States*, 160 U. S. 70 (1895) and *Logan* v. *United States*, 144 U. S. 263 (1892). (3) Finally, the decision below, relating to the conduct of the trial judge, departs, and sanctions such departure by the trial court, from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This ruling, as well, is inconsistent with the decision in *United States* v. *Murdock*, 290 U. S. 389 (1933).

The concurrence of all of the usual reasons for granting review, manifests the subversion, in this case, of the constitutional strictures against unjust conviction. The precendents established by the lower courts, remolding constitutional prerogatives to vindicate the indictment and conviction here, sap the defenses of all Americans against governmental imposition.

The nature of the charge—conspiracy to traffick in the secrets of atomic armament with the Soviet Union—lent itself to the exploitation of the basic political conflicts of the present era. The relaxation of discipline to bar from the courtroom the heat of the environing political turmoil caught the petitioners in the terrible interplay of clashing ideologies and feverish international enmities.

The voice of our own democratic consciences and the eyes of the world question whether the forfeiture of two lives should have been staked on a proceeding which emanated from political animosities, that were given free rein to overwhelm reasoned deliberation. Whether lives may be

taken at all to accommodate the demands of transient political ends, recurs as a constitutional inquiry and a focus of the thoughts of the civilized world. There is a grave responsibility in this Court to assure that American justice has the continued vigor to afford an accused, under the disability of a passion-arousing charge, a fair chance to defend.

Concerning the Statute

1. The instant case is the first to reach this Court which puts in issue the validity of the espionage act, on its face and as construed, under the First Amendment, and for the first time, raises questions under the Fifth Amendment, not considered by this Court in *Gorin* v. *United States, supra.*

Both the trial court, which first heard the challenge on motion to dismiss the indictment herein (R. 160-71), and the Court of Appeals, in its review (R. 1644-48), reach out to the *Gorin* case to draw from it the license of *stare decisis* to avoid the new consideration demanded by the petitioners' contentions.

Unless, however, this Court is moved to determine these issues, this espionage act, enforcing the acceptance of "secrecy" as the coin of national security, will weaken, rather than strengthen, our defensive power as a nation, and stand as an invitation to government by military junta, sanctioned to enforce a total blackout of the free exchange of information.

Analysis of the statute in the context of the contemporary world in which it is enforced, with a fidelity untainted by the anxiety of unseating a "security" measure, reveals these fundamental political consequences to be a reasonably expected result of its continued operation.

The statute, in terms, prohibits the "communication" of information "relating to the national defense" 50 U. S. C. 32(a).

On its face, the sweep of its embargo on "communication" is so complete as to eliminate the interchange of information between the people of this country and the people of the rest of the world,[6] and to burden and restrain even that between citizen and citizen.[7]

The scope of the term "national defense" has been enlarged by the modern understanding of "total war" to include an area as broad as the national life itself. The very court below, in *United States* v. *Heine*, 151 F. 2d 813, 815 (C. C. A. 2d, 1945) cert. den. 328 U. S. 833, acknowledged this truth. Judge Learned Hand, writing for the majority, stated:

> "... every part in short of the national economy and everything tending to disclose the national mind are important in time of war, and will then 'relate to the national defense'."

The total impact of the statute, as it is written, could permit the creation of an unbroken "national isolationism." *United States* v. *Heine*, *supra*, at p. 816. The foundation upon which sound social and political judgments may be made in the complex of modern society—knowledge of a country's cultural, scientific and industrial capacity and development, the "national mind," its "pacific or belligerent temper"—hidden from alien view, may as well be foreclosed to American eyes. *Ibid.* In an era in which

[6] The statute's proscription refers not only to "foreign governments," but as well to "any citizen or subject thereof." 50 U.S.C. 32(a)

[7] The requirement of "reason to believe" that the information transmitted will be used to the injury of the United States or advantage of a foreign nation, makes every person the insurer of the good character and sympathy to the United States of his communicant. *See* Newman, *Control of Information Relating to Atomic Energy*, 56 Yale L. J. 769, 787 (1947). The fear that a communicant, though a fellow citizen, may be "a representative, officer, agent or employee" of a foreign government, and the inculpatory inferences that may be drawn from this fact, may serve as a prior restraint upon communication, even as between citizens.

government policy and political, social and scientific thinking adhere to the concept that strength rests in the interdependence of nations, the statute, by thus embracing the fatal fallacy that security can be achieved by monopolizing information, is a threat of incalculable harm.

No court has questioned that the literal sweep of the statute's prohibitions represents a "drastic repression of the free exchange of information." *United States* v. *Heine*, *supra*, at p. 815; *see also*: 59 Harv. L. Rev. 617 (1946). This Court, in the *Gorin* case, while seeming to assert that, in spite of their connotation, the words "national defense" have achieved a sufficiently limited denotation [8] "to apprise the public of prohibited activities," nevertheless could not safely rest upon this finding. It was constrained to engraft the purported restriction that:

> "Where there is no occasion for secrecy, as with reports relating to the national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign nation." *Gorin* v. *United States*, *supra*, at p. 28.

This statement was read by the court in the *Heine* case to mean that where the information which is the basis of the charge is not "secret", at least in the sense that it has been "published by authority of Congress or the military departments," no crime is charged under the statute. To this immunity from prosecution, the court added, "information which the services never thought it necessary to withhold at all." *United States* v. *Heine*, *supra*, at p. 816.

The courts' constructions, however, merely enhance the

[8] The Court's sole criterion for its conclusion is that the words "national defense" were employed in the Defense Secrets Act of 1911 (36 Stat. 1084), the predecessor of the Espionage Act of 1917. It should be noted, however, that no prosecution was brought under its terms, and no case arose in which its terms were the subject of construction.

repressive potential inherent in the naked mandate of the statute. Control of communication, forbidden by the First Amendment to Congress, is judicially conferred upon the military to exercise in both war and peace on terms less restricted than that ever accorded them even in war. *See e.g.: Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Ex parte Milligan*, 71 U. S. 2 (1866). This power over the dissemination of vital information will permit America's face, at home and abroad, to be drawn in the image of the military censor, and its future course and destiny to be determined by the military hand. *See*: Text of Truman Security Order, *N. Y. Times*, Oct. 5, 1951, p. 12.

The limiting effect of these constructions are, at best, illusory. The authority given to the military to secrete or broadcast "information relating to the national defense," is as broad as the language of the statute itself. The statutory uncertainty is transformed into a regulational uncertainty, to which is added the unpredictability as to what information these departments will classify. *See e.g.*: Government brief in the Court of Appeals, at pp. 9-10 in *United States* v. *Heine, supra;* statement of Assistant Secretary of Defense, Anna Rosenberg, *N. Y. Post*, Jan. 25, 1951.

The statute as it has been construed, therefore, just as the statute on its face, is constitutionally intolerable since it may "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee" of the First Amendment. *Winters* v. *New York*, 333 U. S. 507, 509 (1948); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931).

The court below seeks to shelter the statute from this attack by the assertion of the doctrine that the vagueness of the statute is cured by the requirement of the establishment of "bad faith" (R. 1647). This ruling, however, overlooks the fact that such is not the "scienter" prescribed

by the law. The espionage act requires proof of the specific "intent or reason to believe that the information to be obtained is to be used to the injury of the United States or the advantage of a foreign nation." 50 U. S. C. 32(a).

Yet, the concepts of "injury," "advantage" and "reason to believe," apparently simple on their face, have revealed, in use, that, as guides to conduct and adjudication, they are a source of confusion rather than clarity.

The statute clearly provides that proof, in the alternative, of either "injury" or "advantage" may supply the criminal state of mind under the espionage act. Yet, the *Gorin* case rules that "injury" and "advantage" are synonymous, since "no advantage could be given our competitor or opponent . . . without injury to us," because "unhappily the status of a foreign government may change." *Gorin* v. *United States, supra,* at p. 30. The court in the *Heine* case resisted the theory of the *Gorin* case, adopting the following position:

> ". . . while it is true that it is somewhat hard to imagine instances in which anyone would be likely to transmit information 'relating to the national defense,' which would be injurious to the United States, and yet not advantageous to a foreign power, it is possible to think of many cases where information might be advantageous to another power, and not injurious to the United States . . ." *United States* v. *Heine, supra,* at p. 815.

Faced with precisely the situation contemplated above, the Attorney General of the United States ruled, in the very teeth of the *Gorin* case, that:

> "the fact that the intended use of the information would confer upon a foreign power an advantage subordinate to or identical with that which it would confer on the United States certainly cannot be viewed as bringing the communication within the statutory prohibition." 40 *Op. Att'y Gen'l* 248 (1942).

The *Gorin* case adds to the definition of the intent clauses, the uncertainty stemming from the variability of the classified status of the information communicated (see p. 21, *supra*), and other authorities suggest that the application of the statutory intent will fluctuate with respect to the foreign nation actually the beneficiary. See: *United States* v. *Grote,* 140 F. 2d 413 (C. C. A. 2d 1944); Newman, *Control of Information Relating to Atomic Energy, supra,* at p. 785.

"Reason to believe" being dependent upon each of these factors, partakes of the uncertainty of each.

The divergent interpretations accorded the intent clauses are merely open expressions of the ambiguity which inheres in the statutory language. Their effect is to compound the defects of the language by further confusing it and rendering it useless, as a guide to conduct and adjudication. The question of intent, therefore, rests upon the varying impressions of judges and juries, as to whether certain communications were made with the requisite statutory intent, a finding which "might well be colored by a jury's emotional view of current foreign policy." *See*: 59 Harv. L. Rev., *supra* at p. 618.

The requirements of due process demand that the adjudication of an individual's rights and duties be governed by rules of sufficient objectivity to guard against arbitrary or *ad hominem* results. While the courts may review a conviction to determine whether the statutory intent has been proven [*Dennis* v. *United States,* 341 U. S. 494, 516 (1951)] the statutory definition of intent must provide an adequate warning of the proscribed intent, and mark boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. *Musser* v. *Utah,* 333 U. S. 95 (1948); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Connally* v. *General Const.*

Co., 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921).

The statutory intent of the espionage act, being so vague and indefinite as to violate due process of law, can have no effect in curing the vagueness of the criminal standards of the statute. The decisions in *Dennis* v. *United States, supra; American Communications Association* v. *Douds*, 339 U. S. 382 (1950); *Screws* v. *United States*, 325 U. S. 91 (1945); *United States* v. *Ragen*, 314 U. S. 513 (1942); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925) and *Omaechevarria* v. *Idaho*, 246 U. S. 343 (1918) are inapposite. The statutes which these cases uphold prescribe either a specific intent of well-known meaning,[9] or simply a general requirement of "evil" intent.[10] None of these cases presents a situation in which the intent itself is specifically prescribed, and yet is so vague as to be inadequate as a standard of criminal conduct.

The instant situation is governed by the case of *Herndon* v. *Lowry, supra*, where, in a case involving freedom of speech, the court struck down a statute "general in its description of the mischief and equally general in respect to the intent of the actor . . ." *Id.* at 258.

Examination of this contention of the petitioners was averted by the Court of Appeals on the ground of its belief that this Court would not have decided the *Gorin* case without having made a determination as to the validity of the intent clause (R. 1647). However, since this issue was neither raised by the parties, nor treated with or decided by the Court in the *Gorin* case, not only is the question not foreclosed upon an analysis of the statute under the First

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[9] *Hygrade Provision Co.* v. *Sherman, supra* ("intent to defraud"); *United States* v. *Ragen, supra* ("to evade or defeat" taxes).

[10] *Dennis* v. *United States, supra; American Communications Association* v. *Douds, supra; Screws* v. *United States, supra; Omaechevarria* v. *Idaho, supra.*

Amendment, but as well serves to reopen consideration of the statute under the Fifth Amendment.

In either event, without regard to whether their alleged activities might fall within an area not constitutionally protected by the guarantees of the First Amendment, the petitioners are entitled to the dismissal of the indictment herein, since the statute is, on its face and as construed, violative of the First and Fifth Amendments, and void. *Winters* v. *New York, supra; Herndon* v. *Lowry, supra; Stromberg* v. *California, supra;* Note, *Due Process Requirements of Definiteness in Statutes,* 62 Harv. L. Rev. 77, 86 (1948).

Concerning the Indictment

2. The Court of Appeals accepted the petitioners' contention that an essential element of the statutory crime of espionage is the "secrecy" of the information alleged to be the subject of the conspiracy to commit espionage, in the sense of the *Gorin* and *Heine* decisions. In rejecting petitioners' claimed invalidity of the indictment, grounded on its failure specifically to plead this constituent of the crime, the lower Court's decision comes into direct conflict with decisions of this Court and the well-settled law which prevails throughout the Federal judicial system.

Whether "secrecy" be regarded as a constituent ingredient of the crime, or as the Court of Appeals suggests, an exception to its applicability (R. 1645-46), the indictment, in statutory language which does not specify the "secrecy," does not meet the requirement that it charge every element of the crime, except by the constitutionally inadequte device of inference. *Hagner* v. *United States,* 285 U. S. 427 (1932); *Potter* v. *United States,* 155 U. S. 438 (1894); *United States* v. *Hess,* 124 U. S. 483 (1888); *United States* v. *Carll,* 105 U. S. 611 (1881); *United States* v. *Cruikshank,* 92 U. S. 542 (1875); *United States* v. *Cook,* 84 U. S. 168 (1872).

The enactment of Rule 7(c) of the Federal Rules of Criminal Procedure did not, as the court below indicates (R. 1646), relax this rule. *Carter* v. *United States*, 173 F. 2d 684 (C. A. 10th, 1949); *Robertson* v. *United States*, 168 F. 2d 294 (C. C. A. 5th, 1948); *Frankfort Distilleries* v. *United States*, 144 F. 2d 824 (C. C. A. 10th, 1944), *rev'd on other gr'ds*, 324 U. S. 293; *United States* v. *English*, 139 F. 2d 885 (C. C. A. 5th, 1944). The reasoned decision of the court in *United States* v. *Schneiderman*, 102 F. S. 87 (D. C. S. D. Calif. 1951) contradicts the disposition of the Second Circuit to suspend the operation of this rule where the element is imported by judicial interpretation. *Compare*: *United States* v. *Dennis*, 183 F. 2d 201, 207 (C. A. 2d, 1950), *aff'd on other gr'ds*, 341 U. S. 494.

The inadequacy of the indictment cannot be cured by trial, for the nature of an accused's rights under the Sixth Amendment requires that the indictment, not the evidence, inform him of the nature and cause of the accusation. *Carter* v. *United States*, *supra*; *Elder* v. *United States*, 142 F. 2d 199 (C. C. A. 9th, 1944); *Fontana* v. *United States*, 262 F. 283 (C. C. A. 8th, 1919). Refusal of the Court below to dismiss the indictment was a violation of petitioners' rights under the Sixth Amendment.

Concerning the Trial

The Treason Issue

3. The Constitution (Art. III, Sec. 3) not only specifies what acts can form the basis of a charge of treason, but also how the charge may be proved. It provides:

> "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

This Court, in *Cramer* v. *United States,* 325 U. S. 1 (1944) at pp. 8-35 reviewed at length the various considerations which led to the adoption of this provision. Mr. Justice JACKSON pointed out the many-sided experience with accusations of treason shared by the members of the Constitutional Convention. He especially noted (p. 23) that the two-witness rule had been supported by Benjamin Franklin because "prosecutions for treason were generally virulent; and perjury too easily made use of against innocence."

And (p. 47) he quoted from Chief Justice MARSHALL (in *Ex Parte Bollman,* 4 Cranch. 75, 125, 127):

> " 'As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.
>
> " '. . . It is, therefore, more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.' "

Mr. Justice JACKSON recognized, also, that those observations remain pertinent today, for he said (at p. 48):

> ". . . Time has not made the accusation of treachery less poisonous, nor the task of judging one charged with betraying the country, including his triers, less susceptible to the influence of suspicion and rancor. The innovations made by the forefathers in the law of treason were conceived in a faith such as Paine put in the maxim that 'He that would make his own liberty

secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.' "

It is true, of course, that in the *Cramer* case the Court recognized the power of Congress to make acts deemed detrimental to our safety criminal. *Cf. Ex parte Quirin*, 317 U. S. 1 (1942); *Hartzel* v. *United States*, 322 U. S. 680 (1944). But in so doing Mr. Justice JACKSON was at pains to point out that in such a case the trial would be focused on the accused's intent to commit the particular acts charged, "thus eliminating the accusation of treachery and of general intent to betray which have such passion-rousing potentialities" (p. 45).

It is essential, therefore, in order to prevent an evasion of the constitutional requirements with regard to treason that when a prosecution is conducted under a law establishing a different offense it be so conducted that there be no confusion with treason. Otherwise the "passion-rousing potentialities" of that offense would dominate the trial; the protection against perjury feared by Franklin would be absent.

We submit that the record in the case at bar is such as to require the scrutiny of this Court. We need not remind the Court of the "passion-rousing potentialities" of any prosecution for espionage which involves the disclosure of atom-bomb secrets to Soviet Russia. But the prosecutor was not content to rest on those. Not only did he in his opening stress the circumstance that petitioners were lacking in "loyalty" to this country (R. 180, 181), but he described their activities as "traitorous" and "treasonable" and concluded his opening by stating "all three of these defendants have committed the most serious crime which can be committed against the people of this country" (R. 182, 183, 184).

It has always been supposed that that was the crime of treason. And as such this trial proceeded. In his summation the prosecutor repeated his reference to "traitors", "traitorous", "betrayal" (R. 1517, 1518, 1535). And at the very end, after stressing that defendants were charged with spying on "their own" country (R. 1535) (a circumstance wholly irrelevant under the statute), he went on to characterize them as "these traitors" and said that there was "overwhelming proof of this terrible disloyalty" (R. 1535).

Even the Court was infected. In his charge, Judge KAUFMAN said "irrational sympathies must not shield proven traitors" (R. 1550). And when sentencing petitioners, he spoke of "betrayal", "traitors", "treason" and "treachery" (R. 1613, 1614, 1615). It was because of these considerations that he imposed the death sentence (R. 1616).

Yet petitioners were not charged with treason and under the Constitution could not have been — since at the time of the acts in question Russia was not an enemy but an ally (and the Court charged that this was immaterial) (R. 1553). Moreover, under the indictment here, petitioners were not even charged with intent to injure the United States — an inescapable element of the crime of treason — but only with benefiting a foreign nation. Nor could petitioners have been convicted, if so charged. For two witnesses did not prove all the overt acts — not even under the interpretation placed on the Constitution in *Haupt* v. *United States*, *supra* — and since the verdict was a general one it might have rested on overt acts not so proved. Since the prosecution and the Court poisoned the trial with the passion-arousing virus of a treason charge without according to the petitioners the protection of the "two witness" rule, the conviction was in violation of the mandate of the treason clause.

The Issue of Judicial Misconduct

4. The decision of the Court below introduces novel concepts to define the scope of judicial power to govern the conduct of a criminal cause, in a way to validate the challenged behavior of the trial judge, that had effectively deprived the petitioners of the unbiased and unfettered judgment of their peers. The rulings override the acknowledged qualifications which the Fifth and Sixth Amendments impose on the exercise of that power, and imperil the right of every accused to a fair trial by an impartial jury.

Petitioners' complaint against the conduct of the trial judge was dismissed on the ground that his "purpose" was "clarification" and that any resultant injury was, therefore, "an unavoidable incident of his unchallenged power to bring out the facts of the case." (R. 1651). Thus, the measure of a trial court's discretion to intervene in the prosecution of a criminal cause is held to be the state of mind by which he is motivated, without regard to the impact upon the jury that may be produced by the character of its outward expression. In premising its evaluation upon this subjective standard, the ruling of the Court below comes into square conflict with the established test, which considers, as the controlling factor, the objective effect of the judge's conduct upon the jury. *Bona fides* of judicial behavior cannot sanction the appearance, impression or attitude of judicial partiality, since it is this display which may sway a jury against a defendant, that is constitutionally interdicted.[11] *Ochoa* v. *United States*, 167 F. 2d 341 (C. C. A. 9th, 1948); *Gomila* v. *United States*, 146 F. 2d 372 (C. C. A. 5th, 1944); *Frantz* v. *United States*, 62 F. 2d

[11] Defense counsel's characterization of the judge's conduct as "inadvertent," suggested by the Court below to be "not compatible with the complaints now made," therefore, is neither a waiver of the defense position nor a reflection on the validity or good faith of their claim.

737 (C. C. A. 6th, 1933); *Adler* v. *United States*, 182 F. 464 (C. C. A. 5th, 1910).

By innovating this infirm criterion, the court below, in the instant case, ignored, as a matter of law, what it could not deny, and by implication, admitted, as a matter of fact (R. 1649-50). From the commencement to the termination of the proceedings, the trial judge wore the face of partisanship. He entered the fray of trial conflict, and assumed the role of an advocate. He made it apparent that he was part of the hue and cry against the petitioners.

His interpositions were ubiquitous, and *per se* a usurpation of the responsibility and function of the prosecutor. *Billeci* v. *United States*, 184 F. 2d 394 (App. D. C., 1950); *United States* v. *Earnhardt*, 153 F. 2d 472 (C. C. A. 7th, 1946); *Pasqua* v. *United States*, 146 F. 2d 522 (C. C. A. 5th, 1945), cert. den. 325 U. S. 855; *Ochoa* v. *United States*, *supra*. In the ten trial days devoted to the taking of testimony, his improper interventions numbered 210, the questions he asked totaling over 800 for that period. They were not dictated by the exigencies of beclouded presentation or the incapacity of the prosecutor to elicit the requisite evidence. Indeed, the Judge's interrogations were either superfluities in terms of developing or clarifying the issues, as they were repetitions of questions already asked and answered, and covered subjects already exhaustively treated, or outright arrogations of the role of the government attorneys to discharge the functions of prosecution. *See*: *United States* v. *Brandt*, decided May 9, 1952 (C.A. 2d) as yet unreported.

His inquisitions formed a pattern of buttressing the Government's case and of subverting the defense. By his questioning, he (1) emphasized and re-emphasized key points of the Government's case; (2) protected and rehabilitated Government witnesses; (3) commented on evidence as immaterial or dismissed contradictions brought out by defense attorneys as not very important or convincing;

(4) examined and cross-examined the defendants with hostility. Only the cumulative force of the Trial Judge's improprieties can convey an understanding of the enormity of his misconduct.[12] *See: United States* v. *Brandt, supra.* Delineation of a few representative incidents is inadequate, and, therefore, comprehensive documentation is set forth in the annexed appendix.

In totality, the judge's conduct gave the impression that he believed the petitioners were guilty and exposed him as an advocate straining to bend the jury to his will for a conviction.

The Court below holds, nonetheless, that the trial judge had the right to animadvert on the merits of the case under his right "to comment outright on any portion of the evidence" (R. 1652-53), and on this theory, validates a course of conduct that bespeaks conclusions as to the ultimate issues of guilt or innocence. This opinion confuses "the difference between assisting the jury, which is a duty of a federal judge, and encroaching upon its responsibilities, which is forbidden . . ." *Billeci* v. *United States, supra,* at p. 403.

> ". . . The accused has a right to a trial by jury. That means that his guilt or innocence must be decided by twelve laymen and not by one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether . . ." *Ibid.*

The right to comment is itself not unlimited. *See*: *Quercia* v. *United States,* 289 U. S. 466 (1933); *Virginia Ry. Co.* v. *Armentrout,* 166 F. 2d 400 (C. C. A. 4th, 1948).

The right to convey an opinion, however, where the facts

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[12] This explains why defense counsel made their motion at the end of the entire case.

are in dispute, on matters determinative of the ultimate issue, is flatly prohibited. *United States* v. *Murdock, supra; Billeci* v. *United States, supra; Sullivan* v. *United States*, 178 F. 2d 723 (App. D. C., 1949); *United States* v. *Raub*, 177 F. 2d 312 (C. A. 7th, 1949); *Virginia Ry. Co.* v. *Armentrout, supra; United States* v. *Gollin*, 166 F. 2d 123 (C. C. A. 3rd, 1947) cert. den. 333 U. S. 875. And see *United States* v. *Brandt, supra*, where the Second Circuit itself subsequently recognized the validity of this rule, the force of which it ignored in the instant case. This must necessarily be the rule since a defendant "is entitled to the benefit of the presumption of innocence by both judge and jury till his guilt is proved." *United States* v. *Brandt, supra; Adler* v. *United States, supra*, at p. 472; *Billeci* v. *United States, supra*, at p. 403. And, in no other way can a jury verdict, free of judicial influence, be secured to an accused.

The effect of the approval of the conduct of the trial judge by the Court below, is to set a precedent which empowers Federal trial judges to emasculate, if not destroy these inalienable rights of an accused at any point in the course of a trial. If judicial expression of opinion, by the device of a persistent course of prejudicial practice, such as exists here, can be comprehended under a blanket "right to comment," the floodgates are wide open to engulf the sacred right of an accused to the unrepressed mind of the jury.

The efficacy of the monitory instruction to cleanse the record of judicial misbehavior — the last refuge to which the Court below retreats — has never been held a palliative for all misconduct. *Quercia* v. *United States, supra; Billeci* v. *United States, supra; Sullivan* v. *United States, supra; Frantz* v. *United States, supra. See: Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949).

While, in some instances, instructions to a jury may correct prior judicial aberrations, this is not the case. *See:*

United States v. *Brandt*, *supra*. We enter the unreliable realm of speculation to assess whether three weeks of insidious indoctrination of guilt can be counteracted by reliance on a brief, stereotyped admonition. It defies the accepted laws of psychological behavior to indulge in a presumption, that by this nostrum, a jury can free its assailed mind and restore its lost objectivity. Certainly, in a capital case, tenuous legal abstractions should yield to the facts of life.

5. The judicial anxiety to guide the minds of the jury toward a "guilty" verdict continued to express itself in erroneous instructions to the jury.

(a) The trial judge charged:

> "Because of the development of highly destructive weapons and their highly guarded possession by nations existing in a state of tension with one another, *the enforcement of the espionage laws takes on a new significance*. Our national well being requires that we guard against spying on the secrets of our defense." (R. 1550). (Emphasis ours.)

The rights of the petitioners to their presumption of innocence and a fair and impartial trial were fixed and independent and should not have been equated in terms of the contemporaneity of the prosecution. *Starr* v. *United States*, 153 U. S. 614 (1894).

In this prosecution, where an explosive issue of the nation's security was immanent in the facts, there was no occasion to advise the jury of the special urgency of full enforcement of the espionage law. The advice constituted an invitation to a verdict based on an extraneous and incendiary factor. *See*: *Virginia Ry. Co.* v. *Armentrout*, *supra* at 406.

The full answer to the Court of Appeals' reason for rejecting the petitioners' claim of prejudice, that the ensuing general caution against convicting "innocent persons"

cured the vice (R. 1658-59), is that this prejudicial charge need not have been made at all. Moreover, even the modulating influence of this portion of the charge was immediately overridden by coupling it with the further advice that "irrational sympathies must not shield proven traitors" (R. 1550).

Yet, here, where the gravity of the offense and the volatility of the issues commanded judicial restraint, no mandate could have been given to the jury to correlate the tensions of the times with the "new significance" to enforce the espionage laws, without inviting the return of a verdict predicated, not on the evaluation of the presented evidence, but on the emotional bias of the jurors, and misguided notions of their responsibility as patriotic citizens.

(b) The trial judge, in his charge, reviewed the respective cases of the prosecution and the defense. When he arrived at the point of his resumé dealing with the contentions of the defense as to the motives of the Greenglasses in implicating the Rosenbergs, he charged:

> ". . . and that any testimony by the Greenglasses against them is due to the trouble they had with the Greenglasses while in business together, *or for some other unknown reason.*" (R. 1561) (Emphasis ours.)

This charge was false and misleading as to the other reason being "unknown," as it consigned to the limbo of obscurity an avowed and major defense position. It diverted the jury's attention from the basic strength of the attack upon the Greenglasses' credibility and the Government's fundamental weakness in its support.

The remark was made against the background of a record replete with evidence, direct and circumstantial, from which the jury could have reasonably inferred that the Greenglass testimony was dictated, in the main, by the motive of self-preservation. The distortion was neither

a slip of speech nor sired by lack of understanding. Petitioners' counsels' request to acknowledge and correct the error was met with arbitrary refusal (R. 1568).

The Court below dismissed the perversion as a mere "inaccuracy", offset by the trial judge's general admonition to examine accomplice testimony with care, and by the accurate version given in defense counsel's summation "a short time before." (R. 1661). But, in obscuring from the jury's consideration, the motive of self-interest, normally the basic infirmity of accomplice testimony, the trial judge not only failed to cure the error, but rendered the "accomplice testimony" charge a meaningless formality. The prior "accurate" arguments of counsel, in the context of their subsequently being countered by the prosecutor's summation (R. 1519), and then judicially twisted and ignored to conform with the prosecutor's summation, stood obfuscated, belittled, and emasculated of their vigor to carry weight with the jury. At any rate, since the trial judge, had in fact, and despite his disclaimer, assumed the burden of recapitulation, the Court of Appeals was without warrant to rationalize away his duty to bear the onus of a fair and accurate presentation. *Quercia* v. *United States, supra; Bollenbach* v. *United States*, 326 U. S. 607 (1946).

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom." *Miller* v. *United States*, 120 F. 2d 968, 972 (C. C. A. 10th, 1941).

It is elementary to the concept of a fair trial, that a jury, in reaching its verdict, not be compelled to cope with a judge's misguided analysis of a cardinal issue of the case

(c) A few hours after the jury had retired for its deliberations, it requested a reading of the "testimony" of Ruth

Greenglass, starting with the first approach Julius made to her regarding espionage and terminating at the point "David came home for his furlough in 1945." (R. 1571). Defense counsel thrice requested that the equivalent cross-examination be read as properly part of the "testimony" (R. 1571, 1572, 1573).

The trial judge declined these requests because he believed that the jury had not specifically demanded a reading of the cross-examination (R. 1571, 1573). Each time, he sedulously avoided the use of the simple expedient, also requested by the defense counsel (R. 1572), that his deduction be tested by a plain question to the jury to ascertain whether they desired a reading of the cross-examination (R. 1571, 1572, 1573). In light of the adamant evasion of the trial judge to determine directly the jury's desires, the petitioners should not be constrained to be bound by the speculations of the Court below on the sense of the jury.[13] (R. 1661).

That the jury thus obtained a truncated, fractional and *ex parte* presentation of a vital part of the testimony of a key witness at a critical point in their deliberations can admit of no doubt. The cross-examination could have recalled to the mind of the jury, after a two week lapse (R. 677, 1542): (1) corroboration of the defense contention, fairly inferrable from this testimony, that David was already a spy, because of his ready knowledge of proscribed secrets, at the time he was allegedly seduced into espionage, via Ruth, by the Rosenbergs (R. 398-99, 405-12, 879-902); (2) Ruth's verbatim repetition on cross of her accounts on direct of the alleged conspiratorial occurrences during this period, as bearing on her credibility (R. 682-83, 727-28)

[13] We hesitate to burden the Court with counter-speculations except to suggest the denial of the defense request to read the cross-examination, in the presence of the jury, carried the inference to the jury that it was not entitled to make this request.

(as impeachable by reason of coaching as by inconsistency); and (3) relevant reflections on her emotions and state of mind, contradictory to her actions, as evidence of her testimonial unreliability.

The elimination of this part of the testimony from the attention of the jury, deprived the petitioners of a proper consideration of their defense.

The General Issue of Prejudicial Error

6. The savage sentence of death on the petitioners, unprecedented in the annals of American jurisprudence, is a relevant reflection of judicial prejudice. *United States* v. *Hoffman*, 137 F. 2d 416 (C. C. A. 2d, 1943). The sentence was merely an unabashed expression of the animus which governed his conduct during the trial, and was dramatic confirmation, if any is necessary, of the trial court's hostility to the defendants. In combination with the imbalancing force exerted by the climate in which this case was tried, and the intrinsic emotional pulls of its issues, the impact of the judge's conduct was devastating and contributed to the downfall of the defendants.

In the context of a conspiracy trial, where the issues were sharply contested, where the prosecution was founded on accomplice testimony and circumstantial evidence, and where the record, as we shall hereafter show, was saturated with improperly admitted, inflammatory and prejudicial matter, each individual error of the trial court, alone and agglomerately, "provided the . . . impetus which swung the scales toward guilt." *Glasser* v. *United States*, 315 U. S. 60, 67 (1942). Under such circumstances the decisions of this Court command the overthrow of the conviction below. *Krulewitch* v. *United States, supra; Kotteakos* v. *United States*, 328 U. S. 750 (1946); *Bihn* v. *United States*, 328 U. S. 633 (1946); *Glasser* v. *United States, supra; Berger* v. *United States, supra.* American justice cannot permit the

forfeiture of lives, where the assertion of innocence is so oppressed with unfair advantage.

The Issue of "Communist" Evidence.

7. The Court below rules that independent "evidence . . . to the effect (1) that the defendants expressed a preference for the Russian social and economic organization over ours, and (2) that they were members of the Communist Party . . . possessed relevance . . . (as bearing) on a possible motive for his spying, or on a possible intent to do so . . ." (R. 1654-55).[14] It concedes that petitioners attack the admissibility of this evidence on the ground of *competence*, not relevance (R. 1654). Indeed, in the absence of consideration of the question of competence, the Court's finding of "relevance" is unavailing, as a matter of law, and brings its decision into probable conflict with this court's rulings in *Haupt* v. *United States*, *supra*; *Schneiderman* v. *United States*, *supra*; and *Michelson* v. *United States*, *supra*.

Expressions of "preference" for a "social and economic" form of "organization" denote no more than an academic leaning to a social or political theory, or, at most, the taking of sides in the great debate over economic and political systems that has been raging for a century. Nothing in the proof indicates, as the Court's formulation of the facts acknowledges, that this "preference" had hardened into a devotion to a foreign government or country, imported any obligation to that nation, or dictated a transfer of allegiance to, or division of allegiance between that government and the United States.

"Explicit" statements carrying contrary connotations were admitted in *Haupt* v. *United States*, *supra*, and in

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[14] While the Court of Appeals refers here, in the alternative, to "motive" or "intent", it is not amiss to reiterate that the trial judge submitted the evidence to the jury solely on the issue of intent. (R. 1558). *Cf. Bollenbach* v. *United States*, *supra*.

United States v. *Molzahn*, 135 F. 2d 92 (C. C. A. 2d, 1943) cert. den. 319 U. S. 774.[15] In the *Haupt* case, however, this Court declared a ban against admission of the character of testimony introduced here.

> "Such testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible differences of opinion with our own government or quite proper appreciation of the land of birth." (at p. 642).

The extent to which the admission of this evidence trespassed upon fields of permissible expression is exposed by the efforts of the Government, "logically" extending the theory of the "relevance" of "leftist" ideas, to transmute into evidence of criminality the petitioners' opinions and activities concerning: Russia's carrying the brunt of the war in 1944 (R. 1174); opening a second front in Europe (R. 1174); collection of money for the Joint Anti-Fascist Refugee Committee (R. 1177); membership in the International Workers Order, an insurance fund (R. 1178-81). *Cf. United States* v. *Remington*, 191 F. 2d 246 (C. A. 2d, 1951), 342 U. S. 895; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951); and the signing of a petition by Ethel Rosenberg for the nomination of a Communist Party candidate for the City Council of the City of New York (R. 1346-47).

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[15] In *Haupt* v. *United States*, *supra*, the evidence was deemed admissible because, in addition to showing the defendant's sympathy with Germany and Hitler, declarations of the defendant indicated that he had helped Germany by sending it money; that he had acted because he was "helping the fatherland;" that he would never let his son be drafted into the American Army, but would arrange for his enlistment in the German Air Force, and that, if he were ever drafted into the American Army "he would crawl over to the enemy lines and tell them our position." *United States* v. *Haupt*, 152 F. 2d. 771, 791-2 (C.C.A. 7th, 1945). In *United States* v. *Molzahn*, *supra*, added to the defendant's political sympathies, were his membership and activity in the German Nazi Party and his explicit expression of a "divided loyalty" between the United States and Germany.

The implications of the admissibility of such evidence are portentous. If permissible expressions of belief can be admissible as material evidence in criminal prosecutions for high crimes, the attendant risk of free expression will stifle the exercise of the right.

Membership in the Communist Party, *per se*, is ruled by the Court below to be evidence that a member subscribes to the alleged tenets of the Party, among them the obligation to "go along" with orders to the Party from the Soviet Union to "propagandize, spy and sabotage . . ." on behalf of the Soviet Union (R. 1655).

This Court has held:

> ". . . that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Schneiderman* v. *United States, supra* at 136.

Proof of any matter which must be drawn from "mere" political "association" was therefore held constitutionally inhibited.

It was improper, therefore, to admit proof "to the effect . . . that they were members of the Communist Party," (R. 1654), for evidentiary conclusions to be drawn from its tenets, without proof, which the prosecution did not even assume to elicit, that the Rosenbergs personally accepted the alleged tenets of the Communist Party relevant here, or even knew of them. *Knauer* v. *United States*, 328 U. S. 654, 669 (1946); *Bridges* v. *Wixon*, 326 U. S. 135 (1945); *Schneiderman* v. *United States, supra.*

This failure of proof makes irrelevant the state of the record concerning the two minor premises of the Government's evidentiary syllogism: Party membership of the Rosenbergs, and the existence of Party policy or the enforcement of a discipline on its members to commit espionage for the Soviet Union. It should be noted, nevertheless,

that no *prima facie* proof of membership was educed (R. 240-43, 250-53, 258, 423-24, 679, 1161-64, 1171, 1175, 1178-81, 1183, 1239, 1277, 1302-5, 1309, 1353, 1346-47, 1371), nor does careful analysis of the testimony of the voluble and willing witness Bentley reveal that it forged the "missing link" between membership in the Communist Party and the requisite statutory intent, which was its purport (R. 965-82, 998, 1013-14).

Even if, arguendo, it be assumed that evidence of mere membership in the Communist Party could be a competent base for inferences bearing on motive or intent, upon a showing "that the Communist Party was tied to Soviet causes" (R. 1655), the trial judge committed highly prejudicial error in submitting to the notice and decision of the jury the question as to whether this connection was established. This question was, again, a question of competence, for the judge to decide. *United States* v. *Dennis*, 183 F. 2d 201, 231 (C. A. 2d, 1950), *aff'd* 341 U. S. 494; *United States* v. *Brand*, 79 F. 2d 605 (C. C. A. 2d, 1935); *United States* v. *Cotter*, 60 F. 2d 689 (C. C. A. 2d, 1932). In consequence, the Government was not only permitted, but invited, to qualify as an expert, and smear the record with, the "expert testimony" of the notorious and infamous Elizabeth Bentley, to supply the connection. The effect was to exact from the petitioners the impossible choice between allowing Bentley and her far-flung tale to go unchallenged, or to convert the trial into a trial of Bentley and a defense of the Communist Party. The wisdom of their election to forego a contest of these collateral issues is not pertinent, since the hazard of substantial prejudice inhered in either alternative.

Even the theory upon which the Court of Appeals holds this evidence admissible contravenes well-settled authority, including the decision of this Court in *Michelson* v. *United States*, *supra*. The only probative value of this evidence,

according to the Court below, was that it furnished a basis for the inference that persons holding the political views attributed to the petitioners or being associated in the Communist Party were "more likely to spy for [the Soviet Union] than other Americans." (R. 1654-55). But evidence which is relevant only to "likelihood," propensity or disposition, despite the possible logical "bearing" on the question of intent, characteristic of all "disposition" proof, is, as a matter of policy, rejected. *Michelson* v. *United States*, *supra*; *Smith* v. *United States*, 173 F. 2d 181 (C. A. 9th, 1949); *Lovely* v. *United States*, 169 F. 2d 386 (C. A. 4th, 1948); *Railton* v. *United States*, 127 F. 2d 691 (C. C. A. 5th, 1942); I Wigmore, *On Evidence* (3rd ed. 1940) Sec. 57; *see:* Stone, *Exclusion of Similar Fact Evidence*, 51 Harv. L. Rev. 988 (1938). This policy is founded on a recognition that a communally disdained "disposition" will tend to weigh too much with the jury, and, by providing an extraneous ethical justification for guilt, deny a defendant a fair opportunity to defend a particular charge.

The breach of this rule permitted constant insinuation of the alleged "communist" attachments of the petitioners to permeate the case. In the context of a half-decade of fervent anti-communism, the petitioners may well have been convicted, to paraphrase Professor Wigmore: "not because they were guilty of this crime, but because they were Communists and may as well be condemned . . ." *See:* I Wigmore, *op. cit. supra* at p. 456. Any gap or inadequacy in the proof of the substantive crime may well have been filled by the conjunction of the petitioners' "communism" with the extant popular political fixation that domestic communists merit a suspicion of infidelity to their native land.

Even if some relevance, other than propensity, can be conjured up—and even to the Court below the "relevance" rises only to the level of a "possible bearing"—proper discretion cautions to the exclusion of this evidence, which

cradles the potential of misunderstanding and misuse by the jury. *Brinegar* v. *United States*, 338 U. S. 160, 173 (1949). The risk of nurturing such prejudice in this case was uncalled for. The proof here was not of acts innocent on their face or susceptible of ambiguous construction in terms of the intent. Nor did the defense, consisting of denials of the acts, "confess and avoid" in relation to intent. If the prosecution's evidence was to be believed, the acts *per se* proved the intent "to advantage" charged in the indictment. *Compare: Cramer* v. *United States, supra.* If the prosecution's case was to be believed, the intent would appear to be conclusive beyond all doubt, and the injection of "communist" evidence, at best, cumulative, and, therefore, as a matter of policy to be excluded because "subject only to misuse by complicating the issues and poisoning the minds of the jurors." *Smith* v. *United States, supra*, at p. 185.

The Court below recognized that "such evidence can be highly inflammatory in a jury trial," and doubted whether the trial judge's caution "not to determine guilt or innocence of a defendant on whether or not he is a communist" was no more "than an empty ritual without any practical effect." (R. 1655-56). Strangely, however, instead of exercising its appellate power to secure the petitioners a trial rid of prejudice, it suggests their only remedy to be waiver of their constitutional right to a jury trial in favor of trial "by a judge alone." (R. 1656). It is startling and novel to be told that an accused must abandon his guarantee to a jury trial to secure a fair trial. It would be supererogation to suggest that this Court, when faced with prejudicial error, has followed a far different course.

The omnipresence before the jury of the inflammatory "communist" evidence, having the reasonable tendency to blunt objectivity and juvenate the political prejudices and

passions of our time, heavily weighted the scales for conviction, to the petitioners' substantial prejudice.

The Issue of the "Julius" Telephone Calls.

8. Elizabeth Bentley, a self-characterized spy, testified to her participation in a conspiracy with one Jacob Golos, alleged by her to have been a Soviet agent, between 1938 and the time of his death on November 25, 1943, to secure information from persons in the employ of the United States Government "for transmission to Moscow" (R. 973-78).

Testimony that she had received telephone calls from a "Julius," as "go-between" for Golos and this "Julius" (R. 993-96), was held proper by the Court below, over petitioners' objection that an insufficient foundation had been laid for its introduction, and without consideration of their principal contention that the inference to be drawn of a connection between Julius Rosenberg and the alleged Golos-Bentley conspiracy, had no legitimate evidentiary end. See Appellant-Rosenberg's brief in Court of Appeals 124-26.

The Court below showed itself willing, in the absence of voice identification by the witness (R. 1656-58), to accept a circumstantial base, which did no more than establish the possibility that, during an unspecified interval, the petitioner Julius Rosenberg and Bentley may have known of each other (R. 529), and, at an unspecified time, may have spoken to each other once, on the telephone (R. 261), as sufficient assurance of the likelihood that several specific telephone calls were received by the witness, during a specific period (R. 993-96).[16] The well-settled authorities

[16] "Five," "six," or "eight" calls were allegedly received by Bentley between the fall of 1942 and almost until November, 1943. (R. 1003-04). The so-called foundation relied on was as follows: (1) The antiphonal speaker's self-identification by the name "Julius," asserted in the Government Brief in the Court of Appeals, at pp. 61-64, although not at the trial,

demand that the circumstantial substitute for voice identification pinpoint the specific telephone conversation to be authenticated as to time and place of making and/or receipt, and assure, by independent proof of contemporaneous relations between the parties, that they were the antiphonal speakers. *Jarvis* v. *United States*, 90 F. 2d 243 (C. C. A. 1st, 1937) cert. den. 302 U. S. 705; *Fabacher* v. *United States*, 84 F. 2d 602 (C. C. A. 5th, 1936); *Andrews* v. *United States*, 78 F. 2d 274 (C. C. A. 10th, 1935); *Lewis* v. *United States*, 295 F. 441 (C. C. A. 1st, 1924) cert. den. 265 U. S. 594; *DeWitt* v. *United States*, 291 F. 995 (C. C. A. 6th, 1923), cert. den. 263 U. S. 714; *Robilio* v. *United States*, 291 F. 975 (C. C. A. 6th, 1923) cert. den. 263 U. S. 716; *Wallace* v. *United States*, 291 F. 972 (C. C. A. 6th, 1923); *Pope* v. *United States*, 289 F. 312 (C. C. A. 3rd, 1923) cert. den. 267 U. S. 703.

Acceptance of the evidentiary base, proved here, assured nothing but that the lay minds of the jury would fasten on the identity of the name of the caller, "Julius," established by his self-identification, with the given name of the petitioner, Julius Rosenberg, to reach the legally unwarranted conclusion that the caller was the petitioner. *Wallace* v. *United States, supra; Robilio* v. *United States, supra; Pope* v. *United States, supra.*

What evidentiary purpose the establishment of the pre-

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to be supported by accomplice evidence that Rosenberg used the name of "Julius" in espionage work. This, of course, was contradicted by their expert testimony that code names, not actual names, were employed by espionage agents (R. 815, 826, 985); (2) A conversation testified to by Elicher between himself and Sobell in which Sobell reported to Elitcher that ". . . Rosenberg had told him [Sobell] that he had *once* talked to Elizabeth Bentley on the phone but that he was pretty sure she didn't know who he was . . ." (R. 261). (Emphasis ours.) Even this *single* call, allegedly a base for *several*, was not fixed in time to coincide with the period set by Bentley. Bentley testified she *received* calls, but the so-called foundation does not indicate that her alleged antiphonal speaker *made* the call.

indictment Rosenberg-Golos-Bentley connection was designed to serve, was a mystery in the trial court since the judge, at no time, instructed the jury on this phase of the case. The omission of the Court of Appeals to consider the question at all perpetuates the enigma. By the process of deduction, it is possible, if not to determine the mind of either of the lower courts, at least to reconstruct the variety of possible probative purposes conjured up by the Government to support its admission.

Apparently the prosecution believed that the Rosenberg-Golos-Bentley connection, considered by it to be illicit and in the nature of a conspiracy to commit espionage, was admissible in two ways to prove the crime in chief.

On the trial, the prosecutor indicated the proof was being educed "for the jury to judge whether Julius Rosenberg was one of his [Golos'] contacts" (R. 988) "under the authority of the Dennis case" (R. 990, 988). *United States* v. *Dennis*, 183 F. 2d 201, 231 2 (C. A. 2d, 1950) *aff'd* 341 U. S. 494, stands for no more than that pre indictment declarations (or acts) of conspirators are permitted only insofar as they reveal the early genesis of the conspiracy being tried as tending to prove their involvment in that conspiracy. *See also: Heike* v. *United States*, 227 U. S. 131 (1913); *Scerba* v. *United States*, 61 F. 2d 1009 (C. C. A. 2d, 1932). It did not work a suspension of the fundamental rule that guilt of another offense cannot be proven to show guilt of the offense charged. *Michelson* v. *United States*, *supra*; *Smith* v. *United States*, *supra*; *Lovely* v. *United States*, *supra*; *Railton* v. *United States*, *supra*. And since the government did not prove, assume to prove, or, even in its usual manner, insinuate that it believed, the instant conspiracy had its origin in the Golos Bentley group, it has not brought itself within the rule of the *Dennis* case, but wakens the exclusionary precepts of the *Michelson* case and its scions.

In its brief on appeal in the Court below, the Government relinquished this patently infirm argument, in favor of the newly created suggestion that this evidence was probative of the crime charged because it tended to corroborate the government witness, Elitcher (at p. 64). Elitcher's testimony, thus "corroborated," was his relation of the incident in which Sobell told him that Rosenberg had told Sobell that Rosenberg ". . . once talked to Elizabeth Bentley on the phone . . ." (R. 261). But this second hand admission was the acknowledged circumstantial foundation which supported the admissibility of the "Julius" phone conversation (R. 992) to support the inference of a Rosenberg-Golos-Bentley connection. To permit the Government to use the admission to establish the competency of the phone calls, and then to use the phone calls to corroborate the admission is a ludicrous example of pulling oneself up by one's own bootstraps.[13]

The Government was thus constrained to fall back on a third and fourth alternative, which are equally unavailing. It asserts that: "At most, the evidence showed that in 1942 and 1943 Rosenberg associated with persons who were engaged in Soviet espionage . . ." [Gov't Brief in Court of Appeals, p. 65] as though this were not precisely the proof that the law forbids. *Michelson* v. *United States*, *supra*; 1 Wigmore, *On Evidence*, *op. cit.*, *supra*. If the Government added, it went further, as the petitioners contend it tends to do, and proves a separate offense, it is, nevertheless admissible as a similar act bearing on the intent to commit the crime charged (*Id.* at p. 65). But the bald assertion of "similarity" or speculation as to "simi-

[13] The same contention is made in relation to David's testimony that Julius had told him that ". . . probably Bentley knew him" (R. 529), namely urged at the trial (R. 992-93), and subsequently hotly pressed in the Court of Appeals as a base for admission of the "Julius" calls. See: Gov't brief in the Court of Appeals, p. 64. Obviously, the same answer applies.

larity" from a record that builds no foundation for the inference of "similarity" is inadequate to establish the competence of an act as being so "similar" as to render it admissible as probative of intent. "Similarity" must be proved.[18] *Cf. People* v. *Molineux*, 168 N. Y. 264 (1901); II Wigmore, *On Evidence, supra*, Sec. 302.

Here, there was no such proof. The record reveals neither an identity of personnel, purpose, nor of intent between the alleged Golos-Bentley plot and the crime charged. Nowhere does it appear that the former sought or transmitted "secret" information "relating to the national defense." Its solicitation from United States government employees is no proof of these essential facts. See: *Borum* v. *United States*, 56 F. 2d 301 (App. D. C. 1932); *Crowley* v. *United States*, 8 F. 2d 118 (C. C. A. 9th, 1925). Nor is there any evidence to show that the intent to confer a military advantage on the Soviet Union, requisite here, was the state of mind which moved the Golos-Bentley group. In fact, since the Government cannot point to any "act" which Rosenberg allegedly performed in the Golos-Bentley conspiracy, the proof fails both as to "similarity" and "act." In sum, it is, again, the prohibited evidence of propensity to associate with "spies" to prove the likelihood or disposition of the petitioners having committed the crime charged.

The circumlocutions of the government to rationalize the admission of the evidence, show less heed for the propriety or purpose of its admission, than that a sinister connection between Bentley and Rosenberg appear. That the notorious Bentley was permitted to infer that a link, however tenuous, existed between herself and Rosenberg, was sufficient to brand him with the mark of "spy" which she had

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[18] The same vice inheres in the ruling of the Court of Appeals in relation to the evidence concerning the "theft" of a "proximity fuse" by Julius Rosenberg (R. 1659).

flaunted for the preceding five years (R. 995). Thus indelibly stigmatized, his defense to the charges for which he was being tried, became a study in futility.

The Issue of the "Schneider" Testimony.

9. Section 3432 of Title 18 of the United States Code imposes upon the prosecution in a capital case the mandatory duty to supply the defendant "at least three days before commencement of trial . . . with . . . a list of the witnesses to be produced at the trial for proving the indictment." *Logan* v. *United States*, 144 U. S. 263 (1892); *McNabb* v. *United States*, 123 F. 2d 848 (C. C. A. 6th, 1941), *rev'd on other gr'ds*, 318 U. S. 332; *Horton* v. *United States*, 15 App. D. C. 310 (1899). The obligation is enforceable by the exclusion of the testimony of a witness called in violation of the prescription of the statute. VI Wigmore, *On Evidence* (3rd Ed. 1940) Sec. 1854.

The Government called to the stand as its last witness one Ben Schneider (R. 1424), whose name had not appeared on the list of witnesses furnished to the petitioners prior to the inception of the trial (R. 51-52, 1424-25).

The Court below sanctions the ruling of the trial judge permitting the testimony, over appropriate objections (R. 1424-26), on the basis that the witness was offered in rebuttal, and had been theretofore unknown to the authorities (R. 1661-63). This ruling is probably in conflict with *Goldsby* v. *United States*, *supra*, and *Logan* v. *United States*, *supra*.

Goldsby held the operation of the statute did not "extend to such witnesses as may be rendered necessary for rebuttable purposes resulting from the testimony of the accused in his defense." In context, the reference was to the "alibi" evidence of the defendant.

The pronouncement was read to justify a suspension of the demand of the statute only in situations involving the introduction of new matter arising on a defendant's case,

as was made clear by the *Logan* formulation "by reason of unexpected developments at the trial." *Logan* v. *United States, supra,* at p. 306.

The Schneider testimony was introduced to prove the petitioners' intention of and preparation for "flight", an issue which in theory is, and in fact, was made an integral element of the Government's case.[19] The defense was confined to the denials of the petitioners as to any such intention or preparation (R. 1142-43, 1278-81, 1361-64).

It is extremely doubtful if the Schneider testimony was proper rebuttal at all. But, even assuming its propriety, solely because of the wide discretion vested in a Federal trial court to control the order of proof, it was not such rebuttal as would toll the application of the statute, since the denials here were neither new matter nor created "unexpected developments at the trial," within the purview of the *Goldsby* or *Logan* decisions.

The contrary interpretation, that the names of all rebuttal witnesses can be withheld from the defense, nullifies the protections of an accused which the statute was designed to establish "as a shield for the defense" and provides to sharp prosecutors the impetus and device to frustrate the main purpose of the legislation.

Similarly, the record is bare of any evidence that the Schneider testimony might have been admitted under the exception of a witness "afterward coming to the knowledge of the Government." *Logan* v. *United States, supra,* p. 306. The *voire dire* examination elicited merely that this witness saw F. B. I. agents, and the United States Attorney "as a lawyer" for the first time "yesterday" (R. 1425). No proof was forthcoming that either the F. B. I. or the United States Attorney lacked knowledge of the

[19] David Greenglass testified that in May, 1950, Julius Rosenberg, while advising him to flee the country, indicated that the Rosenbergs, as well, planned flight (R. 529, 713).

witness prior to "yesterday", or that, with reasonable diligence, they could not have known about him. *Cf. United States.* v. *Bayer,* 331 U. S. 532 (1947); *Zurich* v. *Wehr,* 163 F. 2d 791 (C. C. A. 3rd, 1947); *Washer* v. *United States,* 12 F. 2d 925 (C. C. A. 5th, 1926), cert. den. 273 U. S. 705.

It is unthinkable that the authorities, in a case of this importance, for over a year armed with and obviously relying upon David Greenglass' story about the Rosenbergs' planned flight for themselves (R. 529, 713), should not have carefully investigated the subject of passport photos, which appeared to be an integral part of the scheme of flight.[20]

The prosecutor seemed to be concerned with the production of a "surprise" witness on a sensitive issue and to send the case to the jury with a dramatic finish. The lack of notice concerning the identity of Schneider as a witness limited the defense and cramped an investigation that may have demolished the testimony, exposed as glaringly suspect even by the necessarily improvised cross-examination (R. 1429-40).

The injury here underlines the need for the exercise of this Court's power to compel strict enforcement of the law in the interest of the sound administration of criminal justice. General considerations of public policy forbid the prosecution to reap "the fruits of wrongdoing" by its officers [*United States* v. *Mitchell,* 322 U. S. 65, 70 (1944)] and are compelling for a review to cure the substantial prejudice suffered by these petitioners.

Concerning the Sentence

10. The Court below, by virtue of its misconception of the petitioners' contentions relating to the sentence of death

[20] Indeed, the record is even bare of an assertion or representation as to the facts. When defense counsel indicated his willingness to take the prosecutor's word on the subject, the prosecutor disdained a reply (R. 1425). The refusal is susceptible of many inferences, including that his word could not truthfully have been passed.

imposed upon them, failed to reach the constitutional argument upon which they rely. The petitioners neither urged the invalidity of the sentence as "an abuse of discretion", nor pressed for the relief of its "reduction". They assert the unconstitutionality of the sentence, as in violation of the Eighth Amendment, and ask for reversal of the judgment imposing it.

The Eighth Amendment, by its terms, prohibits the infliction of "cruel and unusual punishments". It was conceived, along with the other protections of the Bill of Rights, as a stricture against tyrannical encroachment upon the democratic rights of the people. 2 Story, *Commentaries on the Constitution* (5th Ed., 1891) Sec. 1903; Whalen, *Punishment for Crime: The Supreme Court and the Constitution*, 35 Minn. L. Rev. 109, 111 (1951); 3 *Elliott's Debates* 447, 448. Its initial purport may have been adumbrated by the long course of its usual employment as a protection against inhuman, barbarous or torturous punishment, or the "wanton infliction of pain". *See: Louisiana* v. *Resweber*, 329 U. S. 459 (1947). Yet the force of its original conception has not been lost to this Court. In *Weems* v. *United States*, 217 U. S. 349, 372-3 (1910), it stated:

> ". . . surely they [authors of the Amendment] intended more than to register fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset by vain imagining and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instruments of cruelty could be put into the hands of power? And it was believed that power

might be tempted to cruelty. This was the motive of the clause and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty,' because there was more to be considered than ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose either honest or sinister."

In its most profound import, therefore, the Amendment's prohibitions are recognized to fall upon punishment whose imposition is designed to, or which tends to enforce, or which has the effect of enforcing, political conformity to the concepts of the sovereign. The kind, character and degree of punishment must be measured, case by case, against the yardstick of its power to bring about this illegitimate end. See: *Weems* v. *United States, supra; United States* v. *Ragen*, 54 F. S. 973 (D. C. N. D. Ill. E. D. 1944), *aff'd* 146 F. 2d 349, cert. den. 325 U. S. 865. The instant case, for the first time since the adoption of the Constitution, calls for such a determination by this Court.

The obligation of the trial court was to fix a sentence upon two persons who had been convicted of a specific charge with a view to the "dominant objective of the criminal law . . . reformation and rehabilitation of offenders." *See:* R. 1673; *Williams* v. *New York*, 337 U. S. 241, 248 (1949). The factors which it ignored as well as those to which it accorded significance, in shouldering its burden, evidenced that the deterrent efficacy of its sentence was directed at something other than the vindication of the breach of law ascribed to these petitioners.

The record makes it clear that the theory of the trial judge's sentence was to constitute it a warning against a breach of the Government's political ethic on the sharpest

international and domestic political issues of the present period.

On the issue of political controversy, which inhered in the prosecution of the crime charged, the Government and the defendants were placed at opposite poles. The Government's case assumed not only the burden of the legitimate enforcement of the military security of the atom-bomb, but, as well, the authoritative advocacy of the established Government policy of atomic monopoly, which from the instant of the bomb's detonation at Hiroshima, had, nonetheless, been the subject of popular discussion in both international tribunals and public fora. The prosecution was postulated upon the assumption of the propriety of the diplomatic use of atomic armament in a global power-struggle with the Soviet Union and its Socialist neighbors as acknowledged enemies. It fostered, as a by-product of this conflict, the determined antipathy to tolerance of concepts which encompass the necessity or desirability of mitigating international dissension, eliminating the atom-bomb from the arsenal of morally permissible weapons, embracing theories or favorable estimates of the accomplishments of socialism or communism. While, perhaps, few voices, today are raised in acceptance of these theses, that the adoption of contrary Government policy should foreclose their discussion to the people, is inadmissible.

In his remarks on sentence, the trial judge assessed the gravity of the offense in these terms. He stressed that "the possession of the missile certainly does play a very important part in power politics" (R. 1610); repudiated "delusions about the benignity of Soviet power" (R. 1613); castigated these petitioners for allegedly "making the choice of devoting themselves to the Russian ideology instead of serving the cause of liberty and freedom" (R. 1614), and advanced the frenetic charge that their "be-

trayal" had "undoubtedly . . . altered the course of history to the disadvantage of our country." (R. 1615).

The dictum of the concurring opinion in the Court below, justifying the trial judge on the authority of *Williams* v. *New York, supra,* to consider these extra-judicial factors (R. 1681) is unwarranted. The considerations that move a sentencing judge must have a rational foundation, relevant to the particular crime and criminal. The criteria adopted in this case were egregiously inappropriate in the context of the crime of which these petitioners were convicted.

The gravamen of the crime was the transmittal of atomic information to the Soviet Union, in the period of World War II when that nation's alliance with ours against a common enemy raised no question of its "benignity" and when the atom bomb cast no shadow as a force in the power politics of that nation or ours. Only the ignorant or wilfully blind would urge that this crime, if disposed of at the time it was laid, would have incurred a harsh or vindictive sentence. The measure of the severity of punishment on the gauge of extant political circumstances, non-existent at the time of the alleged commission of the crime, exacted retribution for a crime other than that with which the petitioners were charged. The vindication of the sentences on the ground of the continuance of the conspiracy into the "cold war" period is a mere rationalization of the trial judge's position. Were this the criterion, it would have been reasonable to expect a sentence other than death for Ethel Rosenberg as to whom the record is bare of post-war involvement.

By the imposition upon these petitioners of the unreasonable burden of foreseeing the revised relations between the Soviet Union and the United States, the trial judge freed himself to impute to them an intent, with which they were not charged, to injure the United States, and to fasten

upon them the onus for the subsequent and unexpected turn of history. The forced finding that the petitioners had an intent to injure the United States changed the quality and gravity of the offense. Congress, in passing the Atomic Energy Act of 1946, 42 U. S. C. 1816, for instance, did not see fit to prescribe the death penalty for espionage except where there exists an intent to injure the United States.

The departure from the record to valuate the heinousness of the criminality of the petitioners evidences a design to "serve the maximum interest" in preserving inviolate the Government's political policy. The conviction of the Court that: "It is so difficult to make people realize that this country is engaged in a life and death struggle with a completely different system" (R. 1613) reflects its determination to impress upon the minds of the people, by means of the sentence, the urgency of political compliance.

The sentence of death imposed on the petitioners is unique in American history. No civil court has ever imposed this penalty in an espionage case, and only twice has it been levied by such a court in treason cases, and then never executed (R. 1671). Even in the special context of atomic espionage on behalf of the Soviet Union, only prison sentences were meted out both here and abroad.[21]

This Court has recognized that: "This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial." *Williams* v. *New York*, *supra*, at 248. It has developed, as a sociological fact, into the maximum warning against societally intoler-

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[21] Dr. Klaus Fuchs, in England: 14 years; Allan Nunn May, in Canada: 10 years; (*See: Report on Soviet Atomic Espionage*, *supra*); Harry Gold, here: 30 years (R. 801); and David Greenglass, here: 15 years (R. 1638). Ruth, his wife, was never prosecuted and is presently a free woman (R. 593, 740).

able conduct. Its "coercive" power is, therefore, not to be gainsaid.

Its use in this case, distinguishing it from all others of its kind, exerted its "coercive cruelty" to emphasize that divergence from the Government's political position is not to be indulged, and is clearly offensive to the fundamental proscriptions of the Eighth Amendment. This is certainly the kind of "extraordinary" situation in which the courts have generally conceded their power to act to invalidate the imposition of a penalty which violates the Eighth Amendment, within the terms of a penalty provision on its face valid. *See: Dryden* v. *United States*, 139 F. 2d 487 (C. C. A. 8th, 1944); *Welch* v. *Hudspeth*, 132 F. 2d 434 (C. C. A. 10th, 1942); *United States* v. *Sorcey*, 151 F. 2d 899 (C. C. A. 7th, 1945) cert. den. 327 U. S. 794; *Bailey* v. *United States*, 74 F. 2d 451 (C. C. A. 10th, 1934); *Sansone* v. *Zerbst*, 73 F. 2d 670 (C. C. A. 10th, 1934); *Moore* v. *Aderhold*, 108 F. 2d 729 (C. C. A. 10th, 1939); *Kramer* v. *United States*, 147 F. 2d 756 (C. C. A. 6th, 1945); cert. den. 324 U. S. 878; *Rose* v. *United States*, 128 F. 2d 622 (C. C. A. 10th, 1942), cert. den. 317 U. S. 651; *Reavis* v. *United States*, 106 F. 2d 982 (C. C. A. 10th, 1939); *Martin* v. *United States*, 99 F. 2d 236 (C. C. A. 10th, 1938); *Martin* v. *United States*, 100 F. 2d 490 (C. C. A. 10th, 1938), cert. den. 306 U. S. 649.

Conclusion

The writ of certiorari should be granted, and the judgment below should be reversed with the direction that the indictment be dismissed or, in the alternative, that a new trial be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 111

JULIUS ROSENBERG AND ETHEL ROSENBERG,
Petitioners,

vs.

THE UNITED STATES OF AMERICA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

EMANUEL H. BLOCH,
Attorney for Petitioners.

APPENDIX

Documentation of Judicial Misconduct

A. Emphases and Reemphases of Key Points of Government's Case

Although the subject had been exhausted, the trial judge retraced the incident of Julius' request to Elitcher to turn over blueprints as an aid to Russia, with the promise of cautionary measures. He caused a review of Julius' statement to Elitcher that others were giving military information to the Soviet Union (R. 236) and belabored the point (R. 236-37). He accented Sobell's overture to Elitcher for "military secrets" (R. 246). He stressed the date when Elitcher visited Julius in New York City to discuss espionage (R. 251) and led Elitcher to reiterate that Julius, in 1946 or 1947, advised against any further communication because of some leak in the espionage apparatus (R. 253) and that Julius, Sobell and Elitcher met in New York City in June, 1948, to dissuade Elitcher from leaving his Government post (R. 256). He focused attention to film equipment in Sobell's home on the night in July, 1948, when Elitcher, arriving in New York from Washington, D. C., that evening, immediately accompanied Sobell on his hurried trip to Julius to dispose of material (R. 262); he harped repeatedly on the purpose of this night visit to impute an equivocal evidence, the transfer of contraband from Sobell to Julius (R. 363-64). Again and again, he reverted to the link between Julius and Sobell to recruit Elitcher for espionage (R. 352, 357-58) and compounded the offense by suggestive questions (R. 317-18) with dogged pertinacity (R. 352, 357-58).

* * * * * * *

To surmount any inference that Elitcher was under fear or duress when he gave his first statement to F. B. I. agents after a few days of questioning, a fact which Elitcher admitted later on in his cross-examination (R. 281-83, 367), the trial court, following the negative answer of the witness to the prosecutor's question whether the F. B. I. agents

had used force, coercion, threats or loud and shouting language (R. 383), injected the redundant query "would you say the agents at all times behaved themselves like gentlemen?"

Central episodes in the Government's case were embraced by the trial judge for re-examination, re-illumination, and re-emphasis, to buttress the tales of David, e. g.: the incident of January, 1945, concerning the cutting of the Jello-box and the arrangements for a meeting with an espionage courier (R. 449-50); Gold's visit to the Greenglasses at Albuquerque (R. 456); the "schematic" view of the lens mold set up in experiment turned over by David to Gold (R. 462) and again (R. 466); David's September, 1945 furlough period when Julius came around for atom-bomb information (R. 490); the admission of Julius to David that he stole a proximity fuse for "Russia" (R. 511), the receipt of $1000 by David from Julius in May, 1950, to anticipate David's flight from the country (R. 543).

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The capacity of David to prepare the sketches he allegedly turned over to Julius and Gold was a controversial issue. Dr. Walter S. Koski, a scientist, had already been examined on these sketches (G. E. 2, 6, 7). Yet the trial judge prompted the witness to reiterate that these drawings, fabricated by David for trial purposes, did "set forth the important principle [of implosion] involved" (R. 482) and further re-examined on the same subject to produce the same answer (R. 485-86).

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Ruth was stating the purpose of the Greenglasses in taking passport pictures in the latter part of May, 1950. On a motion to strike "so that he [Julius] would think we were leaving", the trial court interspersed a series of questions to reemphasize that the photographs were taken at Julius' request. Only after this sensitive point of abetting flight had been re-impressed on the jury did the court grant the motion (R. 711-12). Intent on pyramiding the subject of flight, the trial judge persisted in re-extracting from the

witness Julius' statement that he also aimed to flee the jurisdiction (R. 713). Still not content, the judge re-exposed that the $1000 claimed to be delivered to the Greenglasses by Julius on May 24, 1950, came "from the Russians for us [Greenglasses] to leave the country" (R. 786).

• • • • • • •

Gold had already described the incident of June 3, 1945, at Albuquerque, in which he and David "matched" the corresponding parts of a side of a Jello-box and had detailed the cardboard which David showed him as appearing "to be from the same part of the same packaged food from which the piece of cardboard that I had, had originally been cut." Peculiarly unsatisfied with this graphic portrayal, the Court trespassed to re-echo the dramatic event.

The Court: When you say Greenglass matched the two, just what did he do?

The Witness: He showed it to me and put them together, as nearly as I can remember.

The Court: How did you put them together to see whether the ends meet, is that what you did?

The Witness: No, just roughly. I mean you could see at a glance that they were the same thing (R. 825).

• • • • • • •

The political issues held a special fascination for the trial judge. He accentuated that Sobell had recruited Elitcher into the Communist Party (R. 205) and restressed Julius' dismissal from Government service on charges of membership in the Communist Party (R. 241).

David was asked by the prosecutor on his direct examination which political system the Rosenbergs stated they "liked better". Objection was made and sustained, but the Court then put the indistinguishable query as to whether "they [the Rosenbergs] preferred one over another." The response was "they preferred Socialism to capitalism". The Court pursued "which type of Socialism?", the witness: "Russian Socialism" (R. 420). The answers were repetitive as they had since been made to a query from the

prosecutor only two questions back (R. 419-20). Again placing himself in the service of the prosecution, the trial judge adduced that the conversations continued over the years (R. 421).

* * * * * * *

Dorothy Abel, Ruth's sister, was under cross-examination as to specific declarations allegedly made by Julius in her presence with respect to the United States and the Soviet Union. The witness had replied that Julius criticized our Government because it was "capitalistic . . . that is about all I can remember." The following occurred:

Mr. E. H. Bloch: What else?

The Court: Is that the reason they assigned for preferring the Russian form of Government?

The Witness: Yes.

The Court: Was there discussion of the relative merits of the capitalistic form of Government as against communistic form?

The Court desisted only after defense counsel objected to the reintroduction of an answer already given on this inflammatory point (R. 790-91).

* * * * * * *

Prodded by the necessity to forge the nexus to link up membership in the Communist Party of the United States with the crime charged so as to attempt to supply its bearing on propensity, the trial judge engaged in a prolonged examination of Bentley to reaffirm and re-seal her testimony. Falling in with the Court, the witness recounted the "adhesive" (the Court's formulation) relationships between the American Communist Party and the Soviet Union (R. 978-79, 983); and the necessity of members to bend to the "party line as dictated by the Communist International" (R. 983). Having thus discharged the prosecutor's function, he then graciously deferred to protocol. Addressing himself to the prosecutor, he queried "Do you want to take it from there?" The prosecutor adjusted his reply "Yes, if I may. I think your Honor has well, I

wanted to make an observation but I do not think it is necessary. Your Honor has relieved me of a considerable burden" (*Sic*!) (R. 983). The prosecutor was allowed to ask but one more question and received the answer when the trial judge again interrupted and resumed his own interrogation along the same lines that he had already reviewed in extenso.

> The Court: I think I forgot to ask where the headquarters of the National or of the Communist International—was that in Moscow?
>
> The Witness: That was in Moscow, yes (R. 984).

Still the judge persisted. Breaking in between the conclusion of re-direct and the commencement of re-cross, he re-seized the reins of domination and imposed a recapitulation of the identical subject matter:

> The Court: Before you get into that [re-cross] let me make sure I have understood Miss Bentley's answers to what I consider the main issue and main purpose of her testimony—

And thereupon launched into a number of leading questions in the nature of a summation as to the instructions issued to members of the American Communist Party "orally and in writing, in a general way, to do everything to aid Russia" (R. 1013).

B. Protection and Rehabilitation of the Government Witnesses

Elitcher was embarrassed by a discrepancy between his story at the trial that Julius initially visited him at his home in June, 1944, and his statement to the authorities on his first interrogation fixing the date of the visit as "late 1943" or "1944, early, possibly." Defense counsel was seeking to expand on the patent disparity when the Court interpolated "I don't think you [Mr. Bloch] have done it yet" (R. 288).

* * * * * * *

The same witness gave different versions, on direct and cross-examination, of certain conversations he had had with Julius on a visit he and his wife had made to Julius' home in August, 1945. The United States Attorney, to deaden the sting of the conflict asserted "there were conversations that he [the witness] testified to on direct, that took place, and I don't want the witness misled or any impression created that now in his cross-examination he is leaving something that wasn't testified to on direct." Apart from the unpropitious character of the remark, since the prosecutor could have attempted to reconcile the inconsistency on re-direct, the Court cojoined to further obtund the point of attack with the coadunate comment "I think your observation is a sound one." The cross-examiner protested this unwarranted interjection. The Court then intimated to the defense counsel to frame a question, calculated to harmonize the contradiction, but the examiner politely declined the advance (R. 308).

* * * * * * *

Again, the trial judge negatived any misgivings the jury may have collected about Elitcher's reliability. Offsetting the admissions of this witness as to the differences between his testimony and his statements to the F.B.I. agents, and forestalling the requisite basis for a defense request to inspect the prior contradictory statement, the Court declared "I assume you [Mr. Bloch] are trying to do that [*i. e.:* to show the inconsistency]. You haven't shown it as yet." The remark was triply error:—it interfered with the province of the jury as the triers of the facts; it restored the integrity of the witness; it was factually misleading (R. 336-37).

* * * * * * *

Elitcher had failed to record on his direct examination his presence at Julius' home in the week of Christmas, 1946, although he had been asked, in chronological approach, his meetings with Julius. The cross-examiner:

> You forgot about that?
> The Court: [sua sponte, in ripost,] "He wasn't

> asked about it if I remember and it might have been nothing to the Government's case. There is a certain inference in your question that he deliberately withheld it."

Appropriate objection and exception to the remarks were duly noted (R. 342).

* * * * * * *

When cross-examination elicited that Elitcher purchased an automobile a few days before the trial at a time after he had lost his position, to suggest his assurance of immunity from prosecution for perjury in exchange for his testimony at the trial, the prosecutor objected. The Court overruled the objection, but added "You [Mr. Saypol] say there is no relevancy. I am inclined to agree with you but I am going to let him answer" (R. 346-47).

* * * * * * *

When David was trapped in a net of prevarications and inconsistencies, the trial judge labored to extricate him from the pit of untrustworthiness. This procedure occurred when David falsified the length of time he had not seen Julius from June, 1950, to the trial (R. 537); when David was exposed as a dissembler at the time he received $1000 in May, 1950, the Court defeated the blow by deviating from the matter at hand to reemphasize that the money came from Julius for the purposes of flight (R. 543); when David was hard pressed to explain his asserted moral doubts on the propriety of his participation in espionage in the face of the eloquence of his consistent course of conduct to the contrary, the judge insisted on a reconciliation of the repugnancy (R. 552-53); when David foundered to justify his honorable discharge from the Army despite his embezzlements and deliberate breaches of the espionage laws, the Court, disregarding that the cross-examination was delving into David's state of mind in the war years, circumvented to inquire of David's feelings as of the time of trial (R. 555); when David admitted he knew his sister, Ethel, faced the danger of a "possible death penalty" because of his testimony, thus baring to the jury his callous-

ness, and the judge essayed to repair the damage with the diversion "Do you realize also that the matter of penalty is a matter entirely within my jurisdiction, not within the jurisdiction of the jury" (R. 558).

* * * * * * *

David, in response to cross-query whether he failed to reveal to the F.B.I. interviewer in February, 1950, that he engaged in any illegal activity at Los Alamos answered "I didn't tell him, but I was pretty well on the verge to tell him." The motion to strike the latter part of the answer was denied (R. 566).

* * * * * * *

On another occasion, the trial judge disoriented the purport of the cross-examination with the question "Well, you had already confessed, hadn't you?", after a line of interrogation designed to show that David's relation to his fellow prisoners as to his intention "to fight this case against [him]" belied his claim of cooperation with the authorities from the time of his apprehension (R. 600).

* * * * * * *

The trial judge aided David when he admitted he did not mention his sister, Ethel, when interviewed in February, 1950, by eliciting that there was no discussion of Ethel or that David was not directed to discuss espionage, thus sterilizing the development of cross-examination to demonstrate David's wilful concealment of his own activities at Los Alamos and to allow the jury to infer the absence of Ethel's participation in any illegality (R. 566).

* * * * * * *

Cross-examination was embarked on a thorough probe to indicate discrepancies between David's statements to the F.B.I. on the night of June 15 and his trial testimony. Weakening the import of the antagonistic stories, the Court interjected "Well, did you conscientiously withhold any

facts that night?" David parroted in answer "I did not conscientiously withhold those facts." To refine the rationalization and thus insure complete face saving, the Court led David, now on guard, to state he told the authorities on the night of his apprehension "substantially" what he testified at the trial and that arrangements were projected at the time for his making a "subsequent statement" (R. 577-78).

Carrying the onus for the prosecutor, the judge strained to find facts to sustain David's claim he cooperated voluntarily with the authorities that same night by inquiring whether David had been advised of "his right to have a lawyer." David, attuned to the cordiality of the Court, fell in "Sure . . . just about when I started to make a statement." Then cross eked out the revelation that David was advised of his right to legal counsel after he had signed a statement (R. 580-81).

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David was hazy about incidents and conversations that occurred within one year of the trial. The trial judge sustained the prosecutor's objection to the cross-question "But you do remember everything that your wife told you back in November 29, 1944?" (R. 583).

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Admitting material omissions of incidents in his purported statement of the night of June 15, 1950, the trial judge was quick to recoup the loss for David.

The Court: Is there anything you testified here today that you haven't made in the previous statement?
The Witness: There isn't, no——(R. 588).

And, when the cross-examiner spotlighted the glaring incompatibility between the written statement and the testimony, the trial judge guided David to creep through the needle's eye of safety.

The Court: But you told them about it?
The Witness: I had told them about it (R. 590).

The Court: It wasn't your intention at that time to give every minute detail?

The Witness: Not intention but I couldn't remember every minute detail that had occurred (R. 592).

* * * * * * *

To confute David's claim he was concordant with the authorities when he was taken into custody, cross-examination developed his prompt confinement to a solitary cell in the West Street House of Detention. The trial judge opened the door to allow David to assign a speculative "reason" based on hearsay, in explanation of the restrictive restraint (R. 597), to equivocate on his retainer of counsel (R. 598) and to intellectualize his statements to fellow inmates that he intended "to fight the case" (R. 600).

* * * * * * *

The plausibility of David's ability to prepare the sketches of the lens mold and cross-section of the atom-bomb were placed in issue on his cross-examination and was in process of probe. The Court, interfering, inserted a string of liberating queries as to whether "the sketches [were] product of [David's] mind"; or whether he was "helped by anybody on the outside in drawing those sketches"; or "did anybody tell you to change any line here or change any line there?" The negative answers surprised no one. Then the judge turned to the cross-examiner "Now, ask your question" (R. 610-11). Continuing to expose the witness' stunted formal education and training, the defense questioner was soon to watch his path wrecked by an alien explosion. The Court: "and whether he might have turned something over, miscalculating a figure or making an error here and there, is not material to the charge, Mr. Bloch." It cannot be gainsaid that, so abstractedly stated, this dictum did not misstate the law but, in context, it was an irrelevancy on the issue of the witness' credibility, a fact acknowledged by the Court when he permitted further cross-examination on the subject of David's educational background. And the blast did screen the witness (R. 612-13).

Further, the witness conceded the sketches he made for the trial were drawn solely from memory when the Court injected:

The Court: And would you give the same reply with respect to the sketches that you said you turned over to Rosenberg . . .

The Witness: That is correct (R. 626-27).

. . . . . .

David's unreliability was exhibited clearly when he was under cross-examination in connection with the alleged statement of Julius to him on May 23, 1950, to the effect that Julius had obtained a lawyer in case of a "slip-up" in flight plans. The witness' confusion and uncertainty were evident. The Court interpolated: "You [Mr. Bloch] are covering a lot of dates here" (R. 657), a clichéd but clever stratagem to resuscitate the faltering witness.

. . . . . .

David was forced to disclose the animosity and the bitter quarrels between him and Julius while the two were associated in the "Pitt" business. The Court took the initiative to heal the wound.

The Court: And you saw him in 1950 after that?
The Witness: I saw him after that.
The Court: Even after you left the business?
The Witness: That is right (R. 664).

The cross-examiner pursued the subject of the contemporaneous violent antagonisms between David and Julius and dragged from David's lips the revealing fact that David had assaulted Julius. The Court donned the mantle of the prosecutor in his zeal to protect the witness, who clung to the security of authority.

The Court: Subsequent to that, had you patched things up?

The Witness: Certainly, we were very friendly after that (R. 665).

And then the Court followed up with repeated thrusts to ward off the sword of cross-attack that was marking the witness with scars of bias and self-interest (R. 665-66).

* * * * * * *

If David, the "star" spy witness for the Government, found shelter in the Court's preserve, it is not surprising that Ruth, the spy consort, was also given judicial sanctuary.

Ruth was asked whether she remembered "every detail from memory" when the Court interrupted: "She remembered. I don't know about 'every detail.' I think the question is objectionable. She remembered what she testified to" (R. 727). Now the quadruple mistake—the judge testified for the witness; the judge halted proper cross-examination; the judge attested to the accuracy of the witness; the judge infringed on the functions of the jury.

* * * * * * *

Ruth, on cross-examination, was directed to go over her conversation with the Rosenbergs in November, 1944. The cross-examiner, for the obvious purpose of showing the witness was only too well rehearsed, asked whether the witness' recounting of the incident was not a verbatim repetition of her direct testimony. The prosecutor objected; the following was the ruling.

> The Court: Your objection is sustained. I don't know exactly what the point is. If the witness has left out something, Mr. Bloch would say the witness didn't repeat the story accurately, and the witness repeats it accurately and apparently that isn't good.

Then, resustaining the objection, the Court remarked, "Mr. Bloch asked the question, the witness has answered" (R. 728). This was killing many birds with one shot. The judge protected the credibility of the witness and at the same time reproved the defense counsel for attempting to impugn her credibility. The exposition was a prosecutor's summation and at the same time curtailed the opportunity

of the defense to place its interpretation before the jury because the evidence was excised from the record.

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The cross-examiner was seeking to ascertain from Ruth whether she meant to "confess" when David and she should be questioned by the authorities.

> The Court: [interjecting] It means to tell the truth. That means to tell the truth.

Defense pointed out to the judge he wanted the state of the witness' mind, not the meaning of the Court. Whereupon:

> The Court: Can you [the witness] answer the question?
>
> The Witness: [confused but compliant] Well, I have confessed everything I know about it. (R. 731.)

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Ruth was being cross-examined as to whether she told her lawyer that she desired to be a witness for the prosecution. The question bore on the witness' motive for her trial testimony as, within the frame of reference, there were implications of the witness' expectation and plan to be immunized from prosecution as a result of an understanding with the United States Attorney's office. The District Attorney objected to the question.

> The Court: [in concurrence] That is right . . . she has no choice. I say she has no choice in whether or not to be a witness.

This dissertation epitomized the method of circumlocution of the Court to re-establish the probity of a Government witness, to insinuate the desired answer, and to devaluate the significance of the question. Even the Court, though grudgingly, recognized the blatant error which, incidentally, he took no pains to correct and then asked the same question: "All right, did you tell Mr. Rogge that you want to testify?" (R. 734-35).

Still probing for Ruth's state of mind when she was consulting with Mr. Rogge as to her hope not to be punished, the cross-examiner, in order to unearth the motivation for the trial story, was checked by the trial judge, and the point of his inquiries obviated.

The Court: [after warning the questioner to curtail his cross] And remember this, Mr. Rogge is not on trial.

Mr. A. Bloch: Oh, I am not talking about Mr. Rogge.

The Court: Oh, you have in every question, and furthermore Mr. Rogge was not authorized to speak for the Government and you must bear that in mind in your questioning.

Mr. A. Bloch: Your Honor, I don't want Rogge's mind. I want her mind.

The Court: Yes, I know very well what you want.

Mr. Saypol: Your Honor, this is getting away from it.

The Court: You want her mind, not your mind.

Mr. A. Bloch: No, not my mind, either. (R. 739)

* * * * * * *

Ruth was being examined on the Jello box side she allegedly obtained from Julius and kept for many months to match with the other side produced by Gold. When pressed to describe the printing or words on this Jello box side, she answered that her lack of knowledge of details "was not pertinent." The interlocutor's motion to strike the answer was granted and the witness admitted she had not looked at the object in her possession, when the Court disrupted:

The Court: Now let me ask you this: what was important to you?

Of course the witness accommodated her reply to say that her interest was confined to the use of the Jello box side as an identification medium to be matched with the expected courier's other side of the box (R. 773). To further cover the blemish upon Ruth's veracity, the judge added:

The Court: Excuse me, when the bearer of the other half of that side of the Jello box was to come to you, was it your

primary purpose in seeing whether the two sides would fit together like a jig saw puzzle?

The Witness: Yes.

The Court: Very well. (R. 773)

It is no wonder that the prosecutor was not constrained to utilize the leverage of redirect of the witness with the advantage of such interlineations of judicatory initiation.

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When Ruth charged Julius with stating that he was using the "Pitt" as a "front" to conceal his espionage interests (R. 775), she was confronted with the fact of Schein's bona fide investment of $15,000. She explained, "That is not the same thing." After a colloquy in which defense counsel articulated his purpose to clarify any implication left in the last answer, the Court declared, "She didn't imply anything. She said something." Yet immediately the witness admitted she was not trying to imply that Schein was a front. When pressed further to expose Schein's legitimate relationship with the business from which the jury could reasonably infer that "Pitt" was conducted on a sound basis, the Court sustained an objection to the question whether all checks of "Pitt" to be valid needed the countersignature of Schein (R. 776). Then, to afford the witness the opportunity to iterate her repudiated statement, it asked:

The Court: Did you say there was no connection between the Schein investment and your statement that you made concerning Mr. Rosenberg's statement?

A. Yes.

Q. When he said he could have the business as a front?

A. That is right. (R. 777)

The judge's solicitude towards Ruth was indulgent. As the facts indexed the improbability of the witness' story, he sought to expunge them from the minds of the jury either through censorship or sophistry.

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Dorothy Abel, after prompting questions from the Court, had recounted certain statements allegedly made by Julius with respect to preference for the Russian form of government over that of the United States (R. 791). To demonstrate the implausibility of the testimony of the witness, who was then 16 years of age, cross-examination was testing her formal training in courses on politics and related subjects at the time of the making of these statements. Objection to the question of the witness' age was overruled, but the Court characteristically commented:

The Court: It is proper. It might not be likely that she did it [courses, etc.], but it is proper . . . (R. 791)

What function was left for the jury?

* * * * * * *

Dr. Bernhardt had testified on direct that Julius had asked by telephone in May, 1950 whether he would furnish a smallpox innoculation certificate for someone he did not vaccinate. The cross-examination proceeded to inquire about his response to the F. B. I. agents when they first approached him for information on the subject.

Q. What did you say to that?

A. I said "to the best of my recollection he [Julius] had not," [asked for such certificate] (R. 856).

The Court, absorbing the shock of contradiction, then inquired directly whether the witness had not "volunteered" the information (*i. e.*, his direct testimony) "two or three days later" to the authorities. The response was in the affirmative: "I recalled the conversation two or three days later and I volunteered the information" (R. 857).

* * * * * * *

Bentley was under cross-examination. The defense was smoking out her immoral past by showing her extra-marital and illicit relationship with Golos in the years 1941 to 1943.

Q. In the eyes of the American law you were not living with his as legal husband and wife, is that not correct?

The prosecutor objected and the Court joined, "You can't generalize as 'American law' because I understand there are some states that recognize common law marriages" (R. 1000).

The defense counsel attempted to show the affinity was confined to New York.[1]

> Q. Well, will you kindly just think through it a little bit and tell us whether you lived with him outside of New York?
>
> A. I don't think that is necessary.

The impertinence of the witness was condoned.

> The Court: No, no, we have had enough of this subject. (R. 1000-01)

The interlocutor struggled further.

> Q. Would you characterize your relationship with Mr. Golos as your being the mistress of Mr. Golos?
>
> A. I don't feel I am called upon to characterize it. That is up to you . . . (R. 1001)

Again, overlooking the presumptuousness of the witness.

> The Court: No, I am going to sustain the objection. I think she is giving you the facts, characterization is unimportant.

Exception was taken to the Court's ruling, when the prosecutor made an objection in the form of a statement about getting to the main issues of the case.

> Mr. E. H. Bloch: I object to Mr. Saypol's statement.
>
> The Court: Don't take an objection on an objection. Let's go on. I have told you, go on. (R. 1001)

The Court's assumption of moral generosity was used as a shield for the peccable character of Bentley.

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[1] New York State does not and did not at that time recognize the validity of common-law marriages. N. Y. Domestic Relations Law, § 11.

A point was reached in Bentley's cross-examination when the "Julius" telephone conversation became the item on the agenda.

Q. Did you recognize the voice of the man you say called you up and said "This is Julius"?

A. What do you mean recognize?

Q. Are you a college graduate?

The Court: I must say that is ambiguous, recognize, what do you mean?

Q. Do you recognize whose voice it was?

The Court: You didn't say that.

And then the Court proceeded to its own formulation of a question in the same form as the examiner's (R. 1002-03). This was a judicial feat of combining naivete and developed discrimination.

The same method of impairing the effectiveness of cross-examination recurred a few pages later. The defense was unearthing the pecuniary motive of the witness and demonstrated she was a professional anti-Communist who profited from her lectures against Communism. When asked how many times she so lectured, the witness replied, "I simply have no idea." There followed:

Q. Have you lectured extensively on communism in the last two years?

Under objection from the prosecutor "How high is extensively",

The Court: Yes, I do not understand that either.

The defense concretized the question in terms of numbers.

Q. Was it more than five times?

A. It was certainly more than five times.

Q. Was it more than ten times?

A. [again arrogating to herself the prerogative of the Court] I really don't see where this is getting us.

The Court: Yes, I think she is absolutely right, and I think you have got enough of an answer there for the subject that you are after. (R. 1007-08.)

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Bentley's expert testimony on the workings of the American Communist Party was jolted when she admitted on cross-examination her ignorance of the happenings in the rank and file "units" of the organization.

Q. So you do not know, do you, Miss Bentley, as of your own knowledge, what went on at any of these [rank and file] meetings do you?

A. If you mean from '38 on, no.

The Court [robbing the cross of its vigor]: . . . But she continued as a member of the Party. (R. 1014.)

• • • • • • •

As Bentley was brought forward by the prosecution as the expert on communism, defense counsel, to impugn her reputation as an expert, desired to know from her whether she testified for the Government in the celebrated trial of the Government against the "Communist leaders" [*Dennis v. United States*, 341 U. S. 494 (1951)]. The Court, warding off the inevitable negative answer, the only truthful one, added insult to injury. Addressing the questioner,

The Court: Yes, but when I think that under the guise of impeaching the credibility of a witness you are dragging in not only the kitchen sink but the kitchen tub as well, I am going to stop it. (R. 1021-22.)

C. Hostile Cross-examination of the Defendants in the Course of Their Direct Testimony

The trial judge, intent on exploring the volcanic subject of the politics of the defendants, commenced early in Julius' direct testimony to detour the presentation into conflagrant roads. He injected to disrupt the chronological and logical sequence of events to ask Julius whether he had a discussion with Ann Sidorovich as to "the respective preferences of

economic system between Russia and the United States" (R. 1078-79), and again:

The Court: Did you approve the communistic system of Russia over the capitalistic system in this country?

The Witness: I am not an expert on those things, your Honor, and I did not make any such direct statement. (R. 1079.)

And further:

The Court: Well, did you ever belong to any group that discussed the system of Russia?

The witness was finally forced to take refuge in his privilege against self-incrimination (R. 1080). Not far later, the direct was dealing with the incident of the Greenglass' dinner visit to the Rosenberg home during David's 1945 furlough. An interruption:

The Court: Did you express any opinion that the Russians were not getting the cooperation from the Allies that they were entitled to?

A. No, I expressed the opinion that there should be a second front at that time. I don't remember if it was at that time.

The Court: What I am asking you, did you express the opinion that the Russians were not getting the cooperation from the Allies that they were entitled to?

A. I didn't express that opinion, sir. (R. 1085-86.)

The witness, Julius, had denied he ever turned over to Russia any material allegedly delivered to him by David.

The Court: Did you know any Russians at that time? By Russians I mean people who were Russian citizens . . .

A. You mean citizens of Russia?

Q. That is correct.

A. No, I didn't.

Q. Didn't know any at all?

A. Not at all. (R. 1099-1100.)

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Ethel's views on politics were accorded similar treatment.

By the Court: What were your own views about the subject matter of the United States having any weapon that Russia didn't have at that time? That is, in 1944 and 1945.

A. I don't recall having any views at all about it.

Q. Your mind was a blank on the subject. . . . There were never any discussions about it at all?

A. Not about that, not about the weapon.

Q. Was there any discussion at all as to any advantages which the United States had to make warfare that the Russians didn't have?

A. No, nothing of that sort.

Q. You never heard any discussions that there should be equalization between Russia and the United States?

A. No, sir. (R. 1313-14.)

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Ethel had denied knowing any Russian.

The Court: You didn't know any Russian?

A. No, I didn't know any Russian. (R. 1324.)

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The trial judge implied disbelief in Julius' testimony. Julius had chronicled the conversation he had with David at the Rosenberg home in January, 1945, in which "he [David] said he was a machinist at that time (*i.e.*, in the Army) and he just repeated he was a machinist."

By the Court: Didn't you know he was a machinist in '44 when you saw him?

A. Yes, but he said he was a machinist at that time. (R. 1084.)

* * * * * * *

The court attempted to circuit the orderly recital of the subject matter of the examination. Arresting its progress, the Court asked of Julius:

Q. Well, now, you had already met Mr. Elitcher, had you not, by that time?

A. What time?
Q. January.
A. January '44.
Q. '45.

The Court refrained only after defense counsel requested that the matter of Elitcher's visit be deferred until he came to the subject, according to the logic and the plan of direct presentation (R. 1085-86).

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The Court precipitated premature cross on the time in February, 1945, Julius visited and discussed with Ruth, in pursuance of her request (R. 1087), David's perspective to steal Army property (R. 1089), and by protracted questioning tried to confuse the witness.

The Court: She [Ruth] came to see you [Julius, the witness]?

Julius corrected the judge by pointing out that he came to see Ruth, but his efforts were fruitless. The Court followed, "She came to see you?", to which the witness rejoined, "She didn't come to see me" (R. 1090). But the witness' answers evoked only the skepticism of the judge, who imparted his disapprobation to the jury by sharp questioning as to the reasons for Ruth's seeking out Julius for advice (R. 1091).

• • • • • • •

Julius had denied that Ethel typed any espionage material. The judge, in prosecutive manner, intruded:

The Court: Is your wife a typist?
A. Yes, she is.
Q. Do you have a typewriter at home?
A. That is right. (R. 1097.)

And, in prolonged encounter, he fastened his questions on Ethel's typewriting activities (R. 1098) raising derogatory implications. Picking up Julius' explanation that Ethel did practically no typing in 1944, except some sporadic volun-

teer work in the union of which Julius was a member. The Court hammered:

Q. You mean the union didn't have a typist there?
A. Well they had but she was a volunteer worker when I was a member of the union. (R. 1099.)

• • • • • • •

Julius had denied any illegal associations in Schenectady, New York, to refute David's testimony on this point. Again to disparage the credibility of this defendant, the Court interrupted to bring out that Sobell was working at the General Electric plant in that city and then pressed to show a friendship between Julius and Sobell (R. 1107).

• • • • • • •

The order of Julius' recital was undermined by the judge on the occasion when he was on the subject of his business relationship with David. The Court, in an extraneous excursion, shot the following question:

Q. Did you have any discussion with Greenglass' about his going to Mexico?

The answer, of course, was negative, but the adumbration of the exculpatory testimony of the defendant was accomplished. (R. 1112-13.)

• • • • • • •

David's motive in implicating Julius was a vital issue for the jury's decision. The trial judge riddled Julius with inimical inquiries to invoke invidious implications.

Q. Now, up to this time [May, 1950] you had been having some heated arguments, as you call it, heated arguments with David, and take it you were not particularly friendly with him then?
A. Well I would say this: that I was not antagonistic to him. He was my wife's brother . . .
Q. But you were not friendly. That friendship had been strained?
A. Yes, there was strain.

Q. Can you think of any reason why on this occasion he would come to you and confess to you and ask you to help him out instead of going to somebody else?

A. I have no idea why he came to see me. (R. 1120.)

Again intervening two questions further, the judge extended his pointed examination as to Julius' failure to press David to divulge his specific trouble and enmeshment, and as to his limitation in conveying David's confidences to Ethel alone. Increasing the toxic dose, the judge injected more venom by queries as to whether Sobell informed Julius in advance of his travel to Mexico and as to when Julius ascertained this fact (R. 1120-21).

* * * * * * *

The inquisition of the Court was continuous. Julius had demonstrated his dearth of finances to indicate the unreasonableness of David's story that Julius had given him $1000 and an additional $4000 in 1950.

The Court: Well, Mr. Rosenberg, if it was the purpose that Mr. Greenglass has testified it was for, then it would be fair to suppose that the money would never come out of a bank account, isn't that so?

A. Well, it is not for me to say, sir.

The Court: All right. (R. 1124-25.)

It is equally fair to suppose that the judge's argumentativeness was out of place and that summation, under our law, was the role of the prosecutor.

* * * * * * *

Re-entering the fray of trial conflict, the Court, with pronounced bias, re-emphasized Julius' deficiency in failing to find out "what trouble David Greenglass was in" and, twisting Julius' natural reaction to restrict a family affair to the confines of marital trust, insisted:

The Court:

Q. You mean, you acknowledged [to Ethel] the fact that you had not been friendly [with Dave]?

A. No, of course.

Q. And despite that fact, when Greenglass came to you for help, you didn't say to him "Why come to me? We haven't been friendly. Go to some other relative or to some other member of the family."

A. Well, we weren't at each other's throats. He was my wife's brother.

Q. In other words, there hadn't been such a rift as yet.

A. No, there hadn't been. (R. 1126-28.)

The trial judge was relentless in hot pursuit to catch the prey.

The Court: And you can't think of any reason whatsoever, can you, why David Greenglass would, of all the people he knew, his brother, all the members of his family, single you out, as he did apparently and as you say he did, and say that you would be sorry unless you gave him the money?

The Witness: Well, he knew I owed—he had an idea that I owed him money from the business, and I guess that is what he figured he wanted to get the money from me. (R. 1131-32.)

Then counsel resumed his direct examination:

Q. Do you know whether Dave ever went to any of his other relatives to ask them for money?

A. No, I do not know that. (R. 1132.)

And then the Court, baring the fangs of prejudice, stepped up the chase.

The Court: And you do not know of any other relatives of Dave's outside of you and his [David's] sister [Ethel], who has been indicted, in connection with this case?

The Witness: No, I do not know of any other relatives.

The Court: We will recess until 2:20. (R. 1132.)

With this barrage, the judge demolished the barrier between the bench and the prosecutor's table and merged the functions of prosecution and judgment.

* * * * * * *

During Julius' questioning by the F.B.I. on June 16th, 1950, after David's apprehension, the F.B.I. agents told

Julius that David had accused him of espionage. They had not informed him either that David, himself, was accused of this crime, or that he had been arrested. When Julius testified that he had first learned of David's arrest from a newspaper bought after he had left the federal building, the court interjected:

Q. You mean you didn't believe what Mr. Norton and this other gentleman, Mr. Harrington [the two F.B.I. agents involved] were telling you?
A. They didn't tell me he was arrested.
Q. I mean, what Greenglass has said.
A. I didn't believe it. (R. 1142.)

By thus mis-stating the testimony, the judge sought to counterpose the defendant's credibility against the probity of Government agents.

* * * * * * *

Julius had testified to his resumption of normal existence at home and in business after this interrogation by the F.B.I. on June 16, 1950, and up to the time of his arrest one month later.

The Court: (now spreading over the record)

Q. Did you know whether you were under surveillance by the F.B.I. at that time?
A. No, I didn't know.
Q. Did you think you were?
A. It didn't matter.
Q. I am asking you whether you thought you were?
A. I don't know, your Honor. (R. 1143.)

On the follow up direct, the witness responded: "It occurred to me that they would have arrested me if they suspected me" (R. 1143) when the Court again intruded:

The Court:

Q. The answer is you didn't think you were under surveillance?
A. There was a possibility I could have been under surveillance.

Q. Did you think there was a possibility?
A. Yes, it entered my mind. (R. 1143.)

* * * * * * *

Julius denied any corrupt agreement or conduct with Sobell, the co defendant, and explained the social relationships between the two (R. 1146-48). The Court interfering cross questioned closely about these relationships and then, upsetting the logical sequence of the direct presentation, acridly diverted to the new subject of Elitcher's social ties with Julius. (R. 1149.)

The trial judge again intercepted the examination of Julius' visit to Elitcher (a subject the defense was now compelled to embark upon because of the judge's innovation, lest the jury draw any adverse inference if the defendant shied away from the subject at that point) to ask whether Julius was in Washington from 1940 to 1944, the year of Julius' first visit to Elitcher's home. (R. 1150.)

When direct examination was tentatively completed a few pages later, the Court eagerly stepped in before any cross examination started, to re examine Julius, as in cross, with respect to his social relationships with Sobell (R. 1157-58).

Then upon continuation of direct, Julius denied any meeting with Sobell and Elitcher on a New York street in June, 1948. The Court again pre empted the prosecutor's function by further cross examination.

The Court: Did you ever meet them together?
The Witness: Only in Washington, D. C. at that swimming pool.
The Court: Never since?
The Witness: Never since (R. 1158).

The interlocutor persevered to recapture the thread of direct when the Court again meddled with a line of questions on the relationships of the witness with Sobell and Elitcher (R. 1158-59).

* * * * * * *

Ethel's direct examination suffered the similar fate of constant interruptions from the trial judge. The Court's

questions were always slanted to create unfavorable inferences against the defense. So, casting aspersions on the corroborative testimony of Ethel that the controversial console table was purchased at R. H. Macy's and was not an illegal gift, the trial judge sought to find out whether Ethel signed a delivery receipt for the console table (R. 1298), and reverted to the purchase of this article of furniture in the following manner.

The Court:

Q. Did your husband do any other shopping by himself for furniture on any other occasion?

A. He did buy something else, at the time I believe he bought a lamp (R. 1299-1300).

He soon broke up the direct again to emphasize this same subject matter (R. 1300).

* * * * * * *

Ethel denied on direct that she had ever typed any matter relating to the national defense. The Court seized on the subject of "typing" to launch into an extensive examination, via her typing of Julius' answer to dismissal charges by the government, irrelevantly to ascertain whether Julius was a Communist (R. 1302-04)

* * * * * * *

Again assuming the prosecutor's function, the Court in sharp cross wanted to ascertain whether she knew David was working on an atom-bomb project, when she found out this fact, as well as when she discovered he was stationed at a secret post (R. 1312), to subvert her denials as they were made.

* * * * * * *

Ethel was in the midst of her denial of any Jello-box incident, as described by David and Ruth when the Court pressed: "Incidentally, did you have any Jello-box in your apartment."

A. Oh, yes (R. 1318).

* * * * * * *

Ethel was talking about her feelings of love for David, her "baby brother", in the past. The trial judge turned the discussion to David's feelings for her, in obvious attempt to procure corroboration for David's expressions.

The Court:

Q. Did he sort of look up to you?

A. Yes.

Q. And your husband? Before the arguments that were discussed here in Court.

A. He liked us both. He liked my husband.

Q. Sort of hero worship?

A. Oh, by no stretch of the imagination could you say that was hero-worship.

Q. You heard him [David] so testify, did you not?

A. Yes, I did (R. 1322).

* * * * * * *

Ethel was relating her illness in November, 1944, and January, 1945. The following question was before her:

Q. Now, during that period how old was your first born baby?

The Court did not wait for an answer but irrelevantly interposed his inveterate line of thought.

Q. But you saw your brother, didn't you, when he came in on his furlough in January, 1945.

A. Yes, I did.

Then, after this diversion had turned the jury, the witness was permitted to answer the interrupted question (R. 1325).

* * * * * * *

Ethel was relating Julius' account to her with respect to his visit to Ruth in February, 1945, in corroboration of Julius' testimony on this score that Ruth confided in him David's desire to steal from the Army. The Court, in a

transparent effort to belittle the veracity of the witness, engaged in the following exchange:

The Court:

Q. Well, you were in communication, were you not, with your brother, when he was at Albuquerque?

A. Yes.

Q. Did you ever, in any of those letters, tell him to be sure not to steal anything from the Army?

A. No, I didn't say anything like that in my letter (R. 1335).

* * * * * * *

Ethel was in the midst of telling Julius' recital to her of the incident when David asked him to procure a small pox vaccination certificate.

The Court: [insinuating] Did he [Julius] add why he [David] wanted that vaccination certificate?

The Witness: No, I don't recall my husband telling me anything of any reason for it (R. 1336).

The direct resumed for only two more questions and answers in which the witness said she was worried about David's situation when the Court again jabbed: "Well forget whether you were worried about it. What did you do about it?" The witness answered she and her husband could not help David because of their impaired financial condition (R. 1336).

* * * * * * *

Ethel, in refutation of Ruth's version, was describing the incident of her talk with Ruth in July, 1950. She denied she told Ruth to convey to David that he should not talk to the authorities, but affirmed that she assured Ruth of her steadfastness.

The Court:

Q. Did you want him to make a confession of his guilt at that time or did you want him to deny his guilt?

A. I wanted him to tell the truth, which ever it was.

Q. Even if it implicated him, is that right?
A. That is right.
Q. Then what do you mean by standing by him?
A. Well, I wouldn't love him any less.
Q. Is that what you meant by standing by him?
A. That is right (R. 1341).

D. The Court's Hostile Examination of the Defendants in the Course of Their Cross-examination

When the prosecutor took over the cross-examination of the defendants, they were caught in a cross-fire of two enemies, the prosecutor and the trial judge. It is difficult to record whose shots proved more effective.

Julius was describing the way he came to telephone Elitcher preliminary to his first visit to the latter's home in 1944.

A. Mr. Saypol, I was looking in the phone book for any names I could recognize as former classmates or people I knew at one time.
Q. Where did you look in this phone book?
A. At a telephone booth.

The Court: What names were you looking for?
The Witness: For some names I might recognize.
The Court: You mean, you started with "A" and started going——
The Witness: No, I didn't just start with "A". I thought of a couple of people's names who might be in Washington. I remembered the incident at the swimming pool at that time, that Elitcher was in Washington, and perhaps had a telephone.
The Court: What other names did you think of, do you remember?
The Witness: Sobell . . . and

Then the witness explained Sobell's name was not listed in the telephone book (R. 1168).

The witness, in answer to a cross-question, was in the course of relating the reception he received at Elitcher's home on this first occasion.

The Court: (vying with the prosecutor)

Q. Excuse me, did you know what he [Elitcher] was doing at that time in Washington?

A. He said he was working for the Navy Department.

Q. Did he volunteer that or did you ask him?

A. Well, as we were talking and I told him where I worked, when he replied he told me where he worked.

Q. Did you ask him what kind of work he was doing in the Navy?

A. He volunteered the fact that he was doing engineering work.

Q. On what, did he tell you?

A. Not specifically (R. 1170).

* * * * * * *

The witness was on the topic of his discussions with David on the relative systems of the United States and the Soviet Union.

The Court (taking command):

Q. Was that perhaps the topic that was discussed between you when you talked with Elitcher at his house in 1944 the year before?

A. No, it was not (R. 1173).

* * * * * * *

One page later came another judicial interruption pregnant with prejudice.

The Court:

Q. Did I understand you to say here, or if you didn't I ask you the question. Did you in 1944 or 1945 state, and I believe you stated on direct but I am not quite sure, that you had thought Russia was carrying the brunt of the war at that point?

A. That is right, sir (R. 1174).

* * * * * * *

Although the prosecutor was covering the subject thoroughly, he found himself superseded by the Court. In the interchange the witness was doubly pressured.

The Court:

Q. Well, now, did you feel that if Great Britain shared in all our secrets that Russia should at the same time also share those secrets in 1944 and 1945?

A. My opinion was that matters such as that were up to the Governments. The British, American and Russian Governments.

Q. You mean the ultimate decisions?

A. Yes.

Q. Well, what was your opinion at that time?

A. My opinion was that if we had a common enemy we should get together commonly (R. 1175).

* * * * * * *

The Court abetted the shabbiest and most inflammatory cross-examination of the prosecutor. In the light of David's story of his projected flight and Sobell's trip, Mexico was a volatile subject. The prosecutor asked Julius whether his friend, Al Sarrant, was in Mexico, after Julius had previously answered "No, I have no way of knowing his whereabouts." Then the prosecutor queried:

Q. Don't you know that he is in Mexico?

Defense counsel objected and moved for a mistrial. The Court denied the motion. No foundation had been laid by the prosecution to assume or presuppose any such fact; indeed, the prosecution never offered one shred of evidence to show that Sarrant was in Mexico. Yet the Court not only failed to correct the unwarranted and damaging inference but implied the correctness of the fact, by remarking, "It might mean something" (R. 1199-1200).

* * * * * * *

By now it had become plain that the trial judge intervened in the prosecutor's cross only to hurt the witness. He pounced on Julius to exploit the fact that one of the F. B. I. agents who had questioned him on June 16, 1950, later passed Julius' place of business although Julius had asserted the incident did not concern him (R. 1204); he

introduced confusion in the record on the telephone calls made by Julius to Elitcher on his first and second visits to the latter at Washington, D. C. by misplacing and reversing the times of the respective calls preceding the respective visits (R. 1216); he tried to confound and discredit the witness by comparing Julius' answer on cross as to Ruth's statement to him in February, 1945, that David wanted to steal "things" from the Army and his answer on direct where he added he thought "gasoline" as a possible subject of theft (R. 1221). He continued to badger the witness on this same incident by bringing out that Julius' failure to tell anybody about this confidential communication and his lack of caution in taking affirmative steps to prevent David from carrying out his illegal purpose to evoke either disbelief in his story or his lack of patriotism (R. 1221) and further widened the attack by emphasizing that Julius went into business with David in 1946 although he had heard from Ruth the year before of David's "larcenous ideas" (R. 1224) and that at no time did Julius reveal David's thieving predilections (R. 1225-26).

* * * * * * *

Julius was under cross-examination as to the watches he owned. To negative the testimony of David that he admitted he received a watch from the Russians, he accounted for all these personal articles, including a birthday present of a watch from his father in May, 1945 or 1946. An incursion:

The Court: What did your father give you the year before for your birthday?
A. He used to give me shirts, ties.
Q. What did he give you the year before that?
A. Clothing, clothing articles, usually.
Q. This year he gave you a watch?
A. That's correct (R. 1231).

Julius was then subjected to a twin-cross of examination and placed in an unfair position of answering questions on different subjects posed to him in rapid fire consecutiveness. Whereas the prosecutor was directing his inquiries to the

item of watches, the judge confounded the witness with questions on bonds (R. 1231). Then the prosecutor, continuing to query on watches, had to step aside for the judge's query:

Q. Where is that watch today (R. 1232)?

Now the items of watches was fixed on the judge's mind, and he subsequently remigrated to the subject, to put the witness through gruelling cross-examination (R. 1234-35).

* * * * * * *

Julius, after a sharp and thorough cross-examination, had demonstrated that his views on the Soviet Union were garnered from newspapers. The Court, though no further clarification was needed, implemented the point with a slanted series of questions:

Q. Would you say your only source of information from the statements which Mr. Saypol read to you was from newspapers?

* * * * * * *

Q. Not from any direct contact with anybody or what anybody said to you?

* * * * * * *

Q. You mentioned the papers; you mentioned them all (R. 1240)?

The witness adhered to his former answers but the unnecessary re-emphasis of the Court only tended to taint the plausibility of the witness' contention.

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The judge never desisted to exert pressure to subject the witness to personal ordeal. On the subject of discussion between Julius and Ethel about the cause of David's difficulties, the court interrogated Julius as follows:

Q. Did you know at that time [May, 1950] that he [David] probably wanted the certificate to flee from the United States?

A. Sir, I didn't know what he wanted to do.
Q. What did you think?
A. I didn't know why he wanted the certificate.
Q. I mean, did the thought occur to you?
A. I didn't know what his purpose was . . . I tried to arrive at his purpose by questioning him.
Q. I know you say you don't know, but I am asking you, did the thought occur to you that he wanted it to flee the United States.
A. I didn't know, I didn't know what he wanted it for (R. 1254).

Then the prosecutor aped:

Q. Did you think at the time that he was contemplating flight from the country?
A. I have already answered that, Mr. Saypol, a number of times.

The Court: He answered. He said he had no thought on the subject (R. 1256).

Julius had assigned his interpretation for David's request to him for help in May, 1950, disclosing that one of David's brothers had then lost his wife, the other brother, never too close to David, was out of town and therefore "the only close relatives he had was my wife, who was his sister, and myself."

By the Court (to attenuate the logic):

Q. He wasn't going to her, he was coming to you.
A. That is right. He came to the shop.
Q. He didn't on any other occasion go to her, did he?
A. No (R. 1264).

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Julius had expressed to Ethel his belief that David was attempting to "blackmail" him when David's request to him for money in May or early June, 1950 was rejected and David had warned Julius "I just got to have that money and if you don't get me the money you are going to be sorry" (R. 1130).

The Court:

Q. Blackmail you. When did he try to blackmail you?
A. Well, he threatened me to get money. I considered it blackmailing me.
Q. What did he say he would do if you didn't give it to him? You said he said you would be sorry.
A. Yes. I consider it blackmail when somebody says that.
Q. Did he say what he would do to you?
A. No, he didn't.
Q. Did he say he would go to the authorities and tell them you were in a conspiracy with him to steal the atomic bomb secret?
A. No.
Q. Do you think that was what he had in mind?
A. How could I know what he had in mind.
Q. What do you mean by blackmail then?
A. Maybe he threatened to punch me in the nose or something like that (R. 1269-70).

It taxes one's credulity to assume that the judge seized this opportunity for the mere display of his knowledge of a legal definition.

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Finally, the judge re-emphasized the circumstances to raise the unfavorable inference that Julius did not inform the F.B.I. agents on June 16, 1950 about his May and June, 1950, conversations with David. Julius pointed out "since I was unaware of what troubles he was in, I would not aggravate his troubles by telling what my opinion of those troubles are" (R. 1275).

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Ethel was also compelled to run the gauntlet of two cross-examiners. The prosecutor and the judge alternated to impugn her integrity.

The Court joined the District Attorney in inquiring about the watch Julius lost coming home from a vacation and his

report of the loss to the railway company (R. 1344-45.) Again, the Court added to the prosecutor's questions on the photographs taken by the Rosenbergs in May and June, 1950, and then interrupted the normal cross to question the witness sharply and extensively about the details of taking such photographs (R. 1362-63).

The prosecutor had pounded away at Ethel's invocation of privilege against self-incrimination before the Grand Jury in her two appearances in August, 1950, and continued to cling to the subject (R. 1373-77). Then the court, despite a thorough exploration of the questions involved, refastened on the jury's mind that the witness answered questions on the trial whereas she declined to answer on the grounds of self-incrimination before the Grand Jury (R. 1388-89) and then iterated (R. 1391), reiterated (R. 1393-94), reaccented (R. 1396) and re-emphasized (R. 1398) the same subject.

It is of interest that the judge indulged in no cross-examination of the Government's rebuttal witnesses. The comparison between his gentle, protective and defensive treatment of all the witnesss for the prosecution and his display of bias and hostility towards the Rosenbergs was so marked that no one could have remained in any doubt about the Judge's interest for a conviction. The cumulative force of his influence on the side of the prosecution depressed one of the scales of even handed justice and transformed the presumption of innocence into its opposite.[2]

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[2] For numerous other examples of interruptions of the Court to abet the prosecution and to undercut and disparage the defense and defense counsel, *see e. g.* R. 207-08, 217, 423, 427, 494, 525, 558, 570, 572, 578, 581, 586, 624-25, 633, 642, 654, 692, 735, 804, 816, 852-53, 916, 970, 973-74, 990, 994-95, 1045, 1114, 1122-23, 1204, 1218, 1252, 1260, 1280, 1285, 1290. Our adversion to many rebukes of defense counsel and holding them up to disdain is not raised because of any personal pique of counsel but as additional corroboration of the Court's display of animus towards the defendants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 112

MORTON SOBELL,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 112

MORTON SOBELL,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Morton Sobell prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit, rendered February 25, 1952 (petition for rehearing denied April 8, 1952) which decision affirmed, Frank, C. J., dissenting, a judgment of the District Court of the United States for the Southern District of New York, I. R. Kaufman, D. J., convicting petitioner of conspiracy to violate former Title 50, Section 32, U. S. Code, and sentencing him to imprisonment for a term of thirty years.

Opinions Below

The opinions of the Court of Appeals are reported at 195 F. (2d) 583. The opinion affirming appears in the Rec-

ord at R. 1640;* and an opinion denying rehearing at R. 1709 (and see R. 1713). The dissenting judge also wrote for the court, and included his dissenting views within the court's opinion, R. 1663-7, 195 F. (2d) at pp. 600-602. The District Court wrote no opinion in the case.

Summary Statement of Matters Involved

Petitioner was convicted after trial by a jury in the United States District Court for the Southern District of New York on an indictment charging him and others [1] with having conspired between 1944 and 1950 to violate 50 U.S.C. Sec. 32 (Espionage Act, now 18 U.S.C. §794) in allegedly combining to transmit documents, writings, etc., and information relating to the national defense of the United States to the U. S. S. R. with intent and reason to believe that it would be used to the advantage of that country. Motions for a new trial and in arrest of judgment were denied.

Petitioner's conviction was affirmed by the United States Court of Appeals for the Second Circuit, with Judge Frank—who wrote the opinion of the Court—himself dissenting therein from affirmance of petitioner's conviction, on the ground that the trial judge had erred in failing to submit to the jury the question whether petitioner had actually joined the conspiracy charged in the indictment, or whether (if he had not joined) two conspiracies were shown by the evidence.

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* References "R. —" are to pages of the record as printed for the purpose of this petition.

[1] There were seven alleged co-conspirators named in the indictment. Two, Gold and Ruth Greenglass were not, however, named as defendants. Two others, David Greenglass and Yakovlev were not tried; the former, because he pleaded guilty (R. 175-6) and the latter because not present (R. 41). Petitioner was tried jointly with Julius and Ethel Rosenberg, who were likewise convicted and will be petitioners herein in No. 111 this Term.

The Two Conspiracy Issues

In August of 1950, the United States Attorney for the Southern District of New York instituted two prosecutions for conspiracy to violate the Espionage Act.

The one, against Morton Sobell, this petitioner, and Julius Rosenberg, was instituted by a complaint, sworn to August 3, 1950, in which the only overt acts laid were five "conversations" between petitioner and Rosenberg, in the period from January 1946 until May 1948 (R. 25.)

The other was instituted by an indictment filed August 17, 1950 (R. 4-6). The indictment named as co-conspirators David and Ruth Greenglass, Harry Gold, Anatoli Yakovlev, and Julius Rosenberg and his wife. The overt acts covered a series of events occurring between November 15, 1944 and January 14, 1945; one of them referred to "sketches of experiments conducted at the Los Alamos Project." Petitioner Sobell was not named in this indictment, filed two weeks after the complaint against him was sworn to.

These prosecutions of two separate alleged conspiracies were not merged until a superseding indictment was filed October 10, 1950 (R. 6). The superseding indictment has been described by the prosecutor as "in all respects identical" to the original indictment "with the one exception that Sobell was not named in the original indictment."[2]

None of the overt acts listed in either indictment referred directly or indirectly to this petitioner. By an order of the District Court (R. 23-24) which granted but a fraction of a motion by petitioner's trial counsel for a bill of particulars (R. 12-14), the Government was directed to state whether "they still charge the defendant Sobell with the commission of the overt acts set forth" in the separate complaint

[2] Government's brief in opposition to petitioner's motion in District Court to dismiss indictment, p. 2. The superseding indictment was ultimately superseded by the one under which the trial was held (R. 2-4).

against him of August 3, 1950. The Government answered "yes" (R. 24). At the trial, however, there was no proof made of any of the alleged acts.

The overwhelming bulk of the trial record is occupied by testimony relating to atomic espionage. David Greenglass, his wife Ruth, and Harry Gold, confessed and testified to the actual consummation of the substantive offense of espionage in the transmission by Gold of information concerning the atomic bomb and its development, which had been ferreted out by David Greenglass when he was stationed as an Army sergeant at Los Alamos. According to their testimony, the plan was hatched in November 1944, and consummated in two major installments in June and September 1945. The testimony of the Greenglasses was that the defendant Julius Rosenberg and his wife had successfully urged them to commit the crime of atomic espionage; the Rosenbergs denied the Greenglass story, insofar as it pertained to them, and their counsel sought to show that this branch of the Greenglass story was concocted in the not vain hope of obtaining leniency.

None of the testimony concerning "atomic espionage" involved Morton Sobell, this petitioner. He was not mentioned by any of the witnesses to the presumably successful atomic bomb enterprise, nor did any witness testify that petitioner ever knew or heard of the espionage activities of Greenglass, or his wife, or Gold, until their arrest as "atomic spies" was announced.

The only witness against this petitioner[3] was one Max Elitcher. Elitcher was a college classmate of both petitioner and Julius Rosenberg (R. 214). His testimony shows that petitioner was, like himself, an electronic scientist and specialist in "fire control" and electronic computation (R. 245, 248, 351). Petitioner may have advanced technically to

[3] Other than witnesses who testified concerning petitioner's presence in Mexico in the summer of 1950.

a higher degree of skill and recognition than Elitcher (R. 358). Elitcher and petitioner were employed in similar work at Reeves Instrument Company in New York from 1948 to 1950; prior to that, they had worked in separate localities from 1941 to 1948. Their only meetings between 1944 and 1948 occurred when Elitcher sought out petitioner (R. 210, 244-5, 248, 259); he admitted that he and petitioner as scientists and classmates spent a good deal of their time, when together, in talking "shop" (R. 254).

Elitcher had falsely signed a government loyalty oath and both before and during the trial was in a state of alarm about the penalties that might be inflicted on him (R. 278, 361). He had been reminded of his plight when brought to the office of the F. B. I. for interrogation (R. 281-3). He was not, however, ever tried for perjury (R. 292).

The part of Elitcher's testimony that was admissible, initially, against this petitioner consisted of: two requests in 1946-7 to see a pamphlet on "fire control", requests seemingly quite routine since they involved his and petitioner's common field of scientific interest (R. 245-7, 248) but which were permitted to be colored by the witness' "impression" that they had to do with "this espionage business" (R. 249); the convenient description of other conversations otherwise innocuous as having had to do with "this question of espionage" or as having included the exact words "this espionage business" (R. 211, 255); the alleged approval by petitioner of an alleged wish by Julius Rosenberg that Elitcher remain in Washington in 1948 for "this espionage purpose" (R. 257) (a purpose neither previously nor subsequently fulfilled by Elitcher; R. 276, 357, 360-1); and a story concerning a late evening ride which he said petitioner took to Rosenberg's apartment with the purpose to deliver "valuable" but otherwise unidentified information (R. 260-1); Elitcher said he was invited on

this ride *after* he told petitioner he was being followed by F. B. I. agents (R. 260, 361). There was no testimony by Elitcher concerning any other alleged co-conspirator, nor, of course, concerning "atomic espionage".

Thus, the individuals about whom, or by whom, testimony was given, consisted of two groups: there was only a single person belonging to both, the defendant Julius Rosenberg. The pattern of the trial was of a compartmentalization corresponding to the two separate prosecutions originally commenced. How insulated the compartments were was revealed when a question arose during the testimony of David Greenglass (a self-confessed atomic spy), as to whether certain testimony, vital to the prosecutor's case, should be heard in camera, or conceded. The judge expressed annoyance with the reluctance of Sobell's counsel to make the concession. It was, he thought, none of their business. "*Particularly as to your client*," he said; "*where do you come in on this phase?*" (R. 502)

Ultimately, in sentencing petitioner, the judge said to him:

> "The evidence in the case did not point to any activity on your part in connection with the atom bomb project" (R. 1620).

At the close of the Government's case, petitioner's trial counsel moved to dismiss on the ground that the proof had disclosed two conspiracies (R. 1041-8). The Court rejected the motion because he thought that sufficient nexus was shown by the presence of Rosenberg in each alleged group, and the alleged similar purpose of each to aid the Soviet Union (R. 1043, 1047). The motion was renewed at the close of the whole case (R. 1443-5) and objection was made in advance (R. 1450), and afterwards (R. 1569) with respect to the embodiment in the charge to the jury of a "single conspiracy" approach (R. 1557, 1560).

The jury was nevertheless instructed in the Court's charge that it had no choice but to find a single conspiracy, if any (R. 1560), and that petitioner was to be viewed, in consideration of guilt or innocence, as if the transmittal of the secret of the atomic bomb abroad were pursuant to his "command" (R. 1552), under conventional conspiracy doctrine.

The Court of Appeals, although affirming petitioner's conviction, acknowledged that "if in fact, Sobell is right that two conspiracies were proved, then prejudicial error has been committed, for Sobell was jointly tried with major atomic energy spies whose acts and declarations were held binding upon him" (R. 1664-5; 195 F. (2d) at p. 600).

Judge Frank of the Court of Appeals, who wrote its opinion, himself dissented from the affirmance of petitioner's conviction, and voted for a new trial. Passing over the question whether petitioner "could reasonably be held as a member of the Rosenberg-Gold-Greenglass conspiracy," Judge Frank viewed as improper the withdrawal from the jury of "opportunity to choose between the inferences and to decide whether he actually joined the larger conspiracy" (R. 1666; 195 F. (2d) at p. 601).

The Third Issue

Apart from the questions (1) whether petitioner had "conspired" with Julius Rosenberg concerning national defense information available to himself or Max Elitcher and (2) whether Julius and Ethel Rosenberg had conspired with the Greenglasses, and hence with Gold and Yakovlev, concerning the secrets of the atomic bomb, there was a third issue presented to the jury. This involved the significance of the alleged Communist beliefs and associations of the defendants. In the prosecutor's opening statement (R. 180), and in the order of proof, it occupied a preferred posi-

tion. The very first evidence to reach the jury, from the first witness, Elitcher, was that Sobell had invited him, in 1939, to join the Communist Party (R. 198, 203-5). The prosecutor returned to the subject, to dwell on the nature of petitioner's alleged activities in the Communist Party, which were confined to the period 1939-1941, and which consisted of "*discussion* of new events . . . *discussion* of Marxist theory . . . *suggestion*, recommendation to join . . . the American Peace Mobilization . . . *suggestion* to assist the American Youth Congress . . . support was to be obtained for the German-Soviet nonaggression pact for the Soviet Union's position, and *we were to talk* with people and to get general support for the existence of the party and its aims . . . to gain support from people around us for the position of the Soviet Union" (R. 226, 227, 229). (Emph. supp.)

Trial counsel for petitioner, and counsel for his codefendants, made prompt and vigorous objections to this line of testimony (e. g. R. 180, 198, 229-231) and moved for a mistrial or to strike it out at the end of the Government's case (R. 1037-40, 1041). Government counsel, conceding that "I don't think we can establish that the Young Communist League at meetings told members to go out and steal classified information"[4] claimed it should come in "to prove association, to prove motive, to prove intent" (R. 199). The trial judge ruled the testimony to be conditionally admissible: he did not avow that he perceived any relevance to any of the stated issues; but directed the prosecutor to show what was described as a "connection" (R. 199-200).

The "connection" was offered in the person of one Elizabeth Bentley (R. 965). Her testimonial qualification was

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[4] The context indicates this concession applied to the Communist Party as well. (R. 220.)

not that she knew any of the defendants, nor anything about any of the events with which the trial was concerned. It was her own "career", during an earlier period than that of the alleged conspiracy. Having recited her autobiography in capsule form, she was permitted to testify,—as the Court of Appeals summarizes her contribution: "that the American Communist Party was part of and subject to, the Communist International; that the Party received orders from Russia to propagandize, spy and sabotage; and the Party members were bound to go along with those orders under threat of expulsion" (R. 1655; 195 F. (2d) at 595).

The trial judge instructed the jury that such evidence was to be "considered by you *solely on the question of intent*, which is one of the elements of the crime charged herein"[5] (R. 1558). (Emph. supp.). The Court of Appeals made explicit what the trial court had not: that the theoretical basis for all this was that an "attitude" which could be viewed as "devotion to another country's welfare" permits the inference that its holder "is more likely to spy for it than other Americans not similarly devoted. Hence, this attitude bears on a possible motive for his spying or on a possible intent to do so" (R. 1654-5; 195 F. (2d) at 595).

If this reasoning is incorrect—we think it not only incorrect, but a departure from the "accepted and usual course of judicial proceedings"—the error was prejudicial in the extreme. For the Court of Appeals itself observed that the evidence was "highly inflammatory" and that "the Communist label yields marked ill-will for its American wearer" (R. 1655-6; 195 F. (2d) at 596).

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[5] In view of the instructions to the jury, it is not evident why the Court of Appeals referred to this evidence as bearing on "motive or intent". Although remarks during the trial indicated a tentative ruling with respect to motive (R. 202), this was superseded by the quoted portion of the charge.

"Treason"

The prosecutor was permitted to refer to the defendants as "these traitors" (R. 1535, 1517, 1518) or to refer to "these traitorous activities" (R. 183) and "their treasonable acts" (R. 184). The trial judge himeslf told the jury that "irrational sympathies must not shield proven traitors" (R. 1550).

Treason was not charged in the indictment, nor could it have been since the alleged beneficiary of the espionage was not a country with which we were at war.

Other Aspects of the Conduct of the Trial

1. The trial judge interrupted the questioning of witnesses on 210 occasions during the three week trial. It was argued in the court below, as that Court summarized in its opinion the contentions of the appellants, that the trial judge had "(1) emphasized key points of the government's case; (2) protected and rehabilitated government witnesses; (3) commented on evidence as immaterial or dismissed contradictions brought out by defense attorneys as not very important or convincing; (4) examined the defendants with hostility" (R. 1649-50; 195 F. (2d) at p. 593).

The Court of Appeals refrained from deciding whether the conduct of the trial judge, on its view of the record, supported the contention of the appellants, which it thus summarized. It introduced a subjective test of the propriety of such conduct: finding the *purpose* of the trial judge to be permissible, it did not consider its *effect*[6] (R. 1651; 195 F. (2d) at p. 593-4).

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[6] This petitioner takes a joint position as to this issue, with his co-defendants who will be petitioners herein in No. 111 this term; he respectfully begs leave, for purposes of brevity, to incorporate and rely upon the portion of their petition dealing with this issue, and the appendix thereto in which representative instances of the judge's alleged course of misconduct are particularized.

2. Petitioner also objected, in the Court of Appeals, to conduct of the prosecutor whose repeated insinuations that defense counsel was trying to exclude "the truth" (R. 250, 232), ill attempts at humor;[7] injection of inadmissible prejudicial statements in "questions" (R. 926, 1176, 1178, 1194-5, 1199-1200), were all calculated to influence the jury improperly. The Court of Appeals felt it to be an answer that the prosecutor was admonished from time to time, (R. 1667; 195 F. (2d) at p. 602), and that " 'loaded' questions were withdrawn before answering." (id.)

3. Petitioner was shown, by evidence so cumulative in character as to make a major issue of a subsidiary question, to have been in Mexico in the summer of 1950 (R. 857-67, 919-38). There was evidence that he was there for a vacation (R. 861) and he was accompanied by his wife and two small children (R. 31). He left the United States in June at a time when many tourist vacationers go to Mexico City, and prior to the arrest of Julius Rosenberg (R. 862, *cf.* R. 1137), the only alleged conspirator whom, it was testified, he knew. He had casually mentioned his intended departure and destination to a chance visitor, (R. 861-2). There was, however, evidence that after renting an apartment in Mexico City in his own name (R. 920-21), petitioner made trips outside that city during which he went by other than his own name.

The trial judge did not leave it for the jury to say whether the trip to Mexico was evidence of "flight," but so characterized it himself (R. 1559). Nor did he even require when

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[7] There was testimony sought as to whether a photographer who testified that he got more business on Saturday "did a rushing business".

"Mr. Saypol: Did you say a Russian business or a rushing business?"

"The Court: Try to restrain your desire to be another Milton Berle." (R. 1436-7.)

See also R. 252-3, 1268-9, 1270, 1362-3, 1403.

the evidence came in, that any foundation in the form of proof of guilty motive for departure be made.

4. Petitioner re-entered the United States in circumstances which were made the subject of a motion in arrest of judgment, in which the jurisdiction of the United States, and hence of the court below, over his person was contested.[8]

Petitioner did not choose to make an issue, at the trial, of the manner of his re-entry. The United States Attorney, for no reason to be found in the record, chose nevertheless to attempt to prove that petitioner had been "deported from Mexico." After an unsuccessful effort with a "loaded" question to an incompetent witness, (R. 926), he offered, as proof, a notation to that effect made on a record of another branch of the prosecuting agency (Ex. 25, read into record at R. 1031; offered at R. 938-43, 1024-9). Petitioner contended the card was both incompetent and irrelevant.

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[8] The facts disclosed in petitioner's affidavit in support of the motion in arrest showed: that while he was peacefully sojourning in Mexico City with his wife and two small children, he was taken forcibly by four men, who said they were police, but made a false accusation of robbery; prevented from communicating with the American Embassy; beaten until he lost consciousness; and taken, after desultory stops, to the American border where an American agent entered the car even before it reached the immigration station. (R. 31-33.) The record shows that other agents of the F.B.I. were present at the immigration station (R. 1030) and it is quite clear that their presence was part of a prearranged, single transaction. An appropriate inference from the sequence of events was conveniently stated by the prosecutor: "The F.B.I. caught up with him and brought him back and you have him here." (R. 1534.)

The trial judge denied the motion in arrest, and the accompanying request that a hearing be held to determine whether the assault and kidnapping of petitioner were acts done, participated in or instigated by officers of the United States. (R. 1587-99.) He rejected the claim that if this were shown, jurisdiction over petitioner's person fails as having been secured in violation of United States law and international agreement.

The Court of Appeals did not pass upon the question, resting its rejection of petitioner's claim on a ground of "waiver," in failure to raise the point before trial. (R. 1667-70, 195 F. (2d) at p. 603.)

No ground of relevancy was asserted at the trial in response to the trial counsel's objection. When the point was stressed on petitioner's appeal, the Government responded for the first time by the afterthought "Had it not been for that evidence the jury might have inferred that Sobell returned to the United States voluntarily (perhaps from a vacation in Mexico) and that he had always intended to do so" (Govt. Br. C. A. 2 p. 65-6). Petitioner never put the question of voluntary return in issue at any point during the trial; if he had, the evidence purporting to show deportation might, if admissible at all, have been proper only as rebuttal.

The Court of Appeals accepted the Government's argument, and also rejected the contention that the record shows that petitioner, never having had a choice as to whether to return to the United States voluntarily or involuntarily (in view of his kidnapping before he knew he was sought) should not have had used against him as evidence of "involuntary" return circumstances which did not permit exercise of his volition (R. 1667, 1669X; 195 F. (2d) at p. 602, 603).

The Context of Petitioner's Trial

The record shows by internal evidence (*e. g.* R. 57, 59, 63, 74, 153) that which the Court may know judicially: that attention was focused upon, and public emotions aroused by, the trial in the District Court to a spectacular degree.[9]

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[9] The setting of the trial marked it as the trial of the "atom spies". From the beginning to the end of the case this passion-rousing trademark was stamped on all three defendants. N. Y. Times March 7, 1951 ("3 Go To Trial Here As Atom Spies"); N. Y. Daily News March 7, 1951 ("Rosenberg Spy Trial To Bare Top Secret Atom Bomb Data"); N. Y. Times March 8, 1951 ("Theft Of Atom Bomb Secrets In War Stressed At Spy Trial"); N. Y. Times March 17, 1951 ("The Nation's First Atomic Spy Trial"); N. Y. World Telegram and Sun March 15, 1951 ("The Atom Spy Trial Here"); N. Y. Times March 22, 1951 ("The defense of three American Citizens Charged With Wartime Atomic

This could not have been entirely avoided when the first trial involving "atomic espionage" took place so soon after the shattering of the illusion of "atomic monopoly." Nor could a jury have been found which would have been immune to five years of public preoccupation with the danger of atomic devastion.

Statutes Involved

The indictment charged a conspiracy under former Title 50, Section 34, to violate former Title 50, Section 32, United States Code.

The pertinent text of these provisions is as follows:

> "§ 32. Unlawfully Disclosing Information Affecting National Defense.
>
> (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of this subsection in time of war shall be

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Espionage"); N. Y. Daily News March 28, 1951 ("Jury to Get Atomic Spy Case Today"); N. Y. Daily Mirror March 29, 1951 ("Atom Spy Jury Holds Fate Of Three"); N. Y. World Telegram and Sun March 29, 1951 ("3 A-bomb Spies Convicted); N. Y. Daily News, March 30, 1951 ("3 Guilty of A-Spying"); N. Y. Post April 1, 1951 ("All Three Were Convicted of Betraying U. S. Atomic Secrets to Russia").

punished by death or by imprisonment for not more than thirty years . . ."

"§ 34. Conspiracy to Violate Sections 32 or 33.

If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be punished as provided by section 88 of title 18."

These sections have been replaced by Title 18, Section 794, U. S. Code, as of June 25, 1948.

Statement as to Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254. The judgment of the Court of Appeals for the Second Circuit was entered February 25, 1952; petition for rehearing was denied April 8, 1952. By order of Mr. Justice Jackson of April 30, 1952, the time to file this petition was extended to and including June 7, 1952 (R. 1715).

Questions Presented

1. Whether petitioner's conviction under an indictment charging a single conspiracy to transmit unspecified "information relating to the national defense" can stand, where the overwhelming proof at the trial dealt with a completed conspiracy to transmit atomic bomb secrets, in which it was conceded petitioner did not participate, and

(a) Whether on testimony purporting to show that petitioner conspired separately concerning non-atomic information with but one of the participants in the

atomic espionage conspiracy, (and without any evidence that petitioner had any knowledge whatsoever of the atomic espionage conspiracy) it may conceivably be found that a single overall conspiracy was proven;

(b) Whether in such a case, when objection is seasonably raised that the proof has disclosed two separate conspiracies, if any, the question whether petitioner did or did not in fact consent to an alleged dominant aim of the atomic conspirators must be decided by the court or the jury;

(c) Whether an interpretation of an indictment, conceived and presented for the first time in the Court of Appeals, that it was intended to refer to "any and all" information relating to the national defense, may be relied upon to sustain a joint trial under such indictment, where such intendment was never presented to the trial court, and never submitted to the jury;

(d) Whether on this record, it was error to deny a bill of particulars which would have enabled petitioner to learn, in advance of trial, that the charge against him did not involve atomic espionage, and permitted him to move on such ground, for a severance of his trial.

2. Whether petitioner was deprived of a fair trial, in violation of the Fifth and Sixth Amendments, when the charge against him was conspiracy to commit espionage and

(a) The offense for which he was being tried was characterized by trial judge and prosecutor as "treason";

(b) Highly inflammatory testimony of his membership in the American Communist Party, three years before the offense charged, is admitted, although not shown or held to have any bearing on the issues, except for such inferences as may be drawn from its capacity to show propensity or criminal tendency, and even the significance of such membership as showing propensity depends on imputation from association, without proof that petitioner's brief membership in-

volved more than the acceptance by him of quite lawful, although controversial, political beliefs;

(c) The conduct of the trial judge and prosecutor, in particular of a consistent and repeated pattern of the questioning of witnesses by the trial judge evidencing belief in the government's witnesses, and disbelief in the defense, was calculated to implant in the jury the court's belief in petitioner's guilt;

(d) Evidence of petitioner's presence, at a time before the trial, in Mexico, was received as evidence of "flight" without any foundation of guilty motive for departure, and given to the jury as "evidence of flight" without any choice as to whether it was, in fact, "flight";

(e) Evidence purporting to show that petitioner was "deported from Mexico" was admitted without any claim or showing of relevancy, and countenanced by the Court of Appeals on grounds not pertinent, or even raised at the trial (and whether the evidence was in any case competent as a "business entry" when made *post motem litam* by an employee of the prosecuting agency, without personal knowledge).

3. Whether the uncorroborated testimony of one witness can be sufficient to support conviction of conspiracy to commit espionage, where the prosecutor and trial judge repeatedly characterizes the offense as "treason."

4. Whether this conviction can stand when supported principally by testimony as to the conclusions and impressions of the only witness purporting to connect the petitioner with any conspiracy.

5. Whether the statute under which petitioner was indicted is constitutional as construed, and whether the indictment is sufficient if it fails to allege an essential element of the offense under the statute as construed.

6. Whether petitioner was entitled to a hearing, on his motion in arrest of judgment, as to whether he had been kidnapped from Mexico, by or at the instigation of United

States law enforcement officers, in violation not only of domestic, but international law.

Reasons for Granting the Writ

The unusually serious character of the charge, and the important problems of policy which are presented to the executive, the legislature and the people if the jury's verdict in this case was a correct product of fair procedure, are matters of national concern. The major questions presented by this petition are of the character that merit review by this Court; yet apart from their intrinsic legal significance, they arise from a setting where the courts below were susceptible to the temptation to make the "bad law" that sometimes attends cases suffused with the "impregnating atmosphere of the times." (*Dennis* v. *United States*, 341 U. S. at p. 528). The judgment affirmed below requires review with a detachment possible only in this Court.

The important questions raised by petitioner in the Court of Appeals were dealt with, even by that Court, in subordination to its consideration of the appeal of the alleged "atom spies." That court upheld petitioner's joint trial with such alleged "atom spies" only by resort to a construction of the indictment put forward by the Government for the first time on appeal. And even on this construction its decision was probably in conflict with this Court's decision in *Kotteakos* v. *United States*, 328 U. S. 750. A serious and separate question—and one of importance in general application—is presented by the point on which Judge Frank dissented, and on which there is a conflict of circuits: whether the judge may instruct the jury to find a single conspiracy, where the proof is at least equivocal as to whether two or more were proven.

The Court of Appeals most unexpectedly departed from the accepted and usual course of judicial proceedings, in

approving the admission of evidence of criminal tendency or propensity. This departure is in conflict with applicable decisions of this Court (e.g. *Michelson* v. *United States*, 335 U. S. 469); it involved, moreover, the introduction of such proof in a way in conflict with settled principles decided by this Court (*Haupt* v. *United States*, 330 U. S. 63; *Schneiderman* v. *United States*, 320 U. S. 118; *Knauer* v. *United States*, 328 U. S. 654).

The Court of Appeals, in evaluating by a subjective standard (what was the judge's purpose?) a claim of judicial expression of bias rather than an objective one (what was the effect of what he said and did?) has introduced a novel principle, not consonant with the scope of the Constitutional guaranty of a fair trial by an impartial jury.

The other questions of substance herein presented, as well as the foregoing, do independently warrant the exercise of this Court's power of supervision. In each there is presented, moreover, the pervading question of whether petitioner received a fair trial, a question which in this case must be settled with the authority of this Court.

I. Oppressive Use of the Conspiracy Device

Petitioner's Joint Trial with Alleged Atomic Spies

The "continuing threat to fairness in our administration of justice" arising from "loose practice" as to use of conspiracy indictments (*Krulewitch* v. *United States*, 336 U. S. 440, 446) has presumably prompted this Court twice, in recent years, to review claims of the particular sort of unfairness presented where there has been proof of more than one conspiracy, on a single conspiracy indictment. *Kotteakos* v. *United States*, 328 U. S. 750; *Blumenthal* v. *United States*, 332 U. S. 539. The unfairness which the courts have been cautioned to guard against has consisted, essentially, in the danger of "transference of guilt from one

to another across the line separating conspiracies" (*Kotteakos*, 328 U. S. at 754).

There has been no case in the history of the employment of the "dangerous instrumentality" of the conspiracy prosecution where the defendant occupied such an "uneasy seat"[10] as this petitioner, in the presence of "evidence of wrongdoing by somebody" else, so calculated to arouse the feelings of the jury against him, and to prevent the jurors from deliberating objectively on his guilt or innocence.

Of significance overriding any conceivable analytical discussion of the concepts of the law of conspiracy is the dreadful position of this petitioner at this trial—a position in which he was placed by the merger of two separate conspiracy prosecutions brought about by the superseding indictment. The prosecution must have known at the outset what it declined to reveal by way of bill of particulars and what the trial judge ultimately acknowledged: that "the evidence in the case did not point to any activity on [petitioner's] part in connection with the atom bomb project" (R. 1620). The record will be searched in vain for any evidence of knowledge on petitioner's part of atomic espionage. His culpability, if any, must be found in his alleged relationship as to other matters with a single co-defendant, Julius Rosenberg, a relationship that did not import knowledge of or acquiescence in atomic espionage. To have dragged this petitioner into a trial where his life was at stake, by merger of the two separate accusations of conspiracy, with knowledge that he had nothing to do with the atomic bomb, was diabolical. It was hardly the type of unthinking expedient which sometimes leads to two unrelated bootleggers or counterfeiters being tried together.

Ever since the disclosure of the dropping of the first atomic bomb on Hiroshima in 1945, the people of the United

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[10] *Krulewitch*, supra, at p. 454.

States have been warned incessantly of the sheer horror of the new weapon; "a state of intense public alarm"[11] was created, unprecedented in world history. The trial judge expressed, immediately after the return of the verdict, what had undoubtedly been in every juror's mind[12] throughout the trial and during all their deliberations: "The thought that citizens of our country would lend themselves to the destruction of their own country by the most destructive weapon known to man is so shocking that I can't find words to describe this loathsome offense" (R. 1580).

The Government did not deny in the Court of Appeals and that Court accepted petitioner's claim, that if "two conspiracies were proved, then prejudicial error has been committed" (R. 1664, 195 F. (2d) at p. 600).[13] The preju-

[11] Blackett, Fear, War and the Bomb (1949) p. 7. See for example:

"There is no defense against the atomic bomb * * * forty million human beings may be killed in half an hour." Hutchins, The Atomic Bomb versus Civilization, (1946) p. 7, 8; "the scientists' most striking victory of all time threatened on balance to become the heaviest blow ever struck against humanity" (Brodie, The Absolute Weapon (1946) p. 4); "a good chance of winning the war in the end, but what good was that if in the meantime the urban population of the nation had been wiped out" (id.); "This book is dedicated to humanity in the hope that it may exist longer than recent events lead us to suppose" (Brown, Must Destruction be Our Destiny (1946); "the construction of the atom bomb has brought about the effect that all the people living in cities are threatened everywhere and constantly, with sudden destruction" (Einstein, The Way Out, in Masters and Way, eds., "One World or None" (1946) p. 76; and see Los Alamos Scientific Laboratory, The Effects of Atomic Weapons (U. S. Government Printing Office, 1950) *passim*.

[12] See, e.g., voir dire, at R. 139: "[—A prospective juror:] . . . because I personally have seen the effects of the atomic blast at Hiroshima, I think my mind would be prejudiced in this particular case."

[13] The presentation of the prosecution's case was calculated to enhance the prejudice. There was the clearing of the courtroom for the purpose of "protecting" a portion of the Greenglass testimony (R. 505-10) despite the fact that if Greenglass and Gold were to be believed, the evidence was beyond protection (R. 828-30); there was "high-level" testimony as to the gravity of the atomic security breach. (R. 903-16); there was brought out in unnecessary detail the dealings of Gold with Emil Julius Klaus Fuchs, (R. 835-9) who has already been characterized in an opinion in this Court as "the most notorious spy in recent history."

dice was so great that only the clearest showing of logic and necessity could justify the merger of the two accusations of conspiracy, a showing not capable of being made here; yet the trial court gave the matter but superficial consideration, and the majority in the Court of Appeals had to strain to support the joint trial by relying upon a newly contrived interpretation of the indictment first presented in that Court by the prosecution.

The view expressed by the trial judge in upholding the prosecutor's "single conspiracy" theory, was demonstrably in conflict with this Court's decision in *Kotteakos* v. *United States*, 328 U. S. 750. The colloquies that ensued when Sobell's trial counsel moved to dismiss the indictment at the close of the Government's case (R. 1041-8) and at the close of the whole case (R. 1443-5) show that the trial judge thought it sufficient that petitioner had allegedly "worked with" (R. 1043) Julius Rosenberg, and the atomic conspirators were allegedly linked to the same man, and that there was an alleged similar purpose to send secret defense information (although not the same information) to the U. S. S. R. (R. 1047). The trial judge here was clearly

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(*Dennis* v. *United States*, 341 U.S. 494, 548.) Indeed there is an inconsistency still unexplained, between the acknowledgment by the prosecutor, and the trial judge of the separate status of Fuchs, and the trial court's reasoning in ruling that a single conspiracy had been proved below. The trial judge accepted, without reflection, the theory that two groups which had in common a single member—Rosenberg—and a parallel objective—sending information to Russia—constituted a "single conspiracy". (R. 1043.) Yet the prosecutor himself, and the trial judge, denied that where two groups overlapped by the presence of Harry Gold, they became merged into a single conspiracy. During the examination of Gold, Rosenberg's counsel became apprehensive of an attempt to inject conversations between Gold and Fuchs. The prosecutor disclaimed such intention and the Court remarked: "They are not putting it in to establish that a conspiracy existed between Gold and Fuchs." (R. 836-7.) Likewise, the prosecutor assumed and the Court readily acknowledged that one Slack who was said to have given information to Gold who said he gave it to Yakovlev, was not a co-conspirator with the defendants on trial. (R. 844-5.)

wrong—as the trial judge in the *Kotteakos* case had been [14] —in supposing that such facts *alone* merged the two groups into a single conspiracy.

The Government did not attempt to defend the trial judge's position in the Court of Appeals, on petitioner's appeal there. Instead it relied on an interpretation of the indictment which was itself advanced *for the first time* in the Court of Appeals, in response to petitioner's separate argument there concerning the sufficiency of the indictment. The petitioner had claimed that the generality of reference in the indictment to "information relating to National Defense" was bad; that there should have been specified, or enumerated, the species of the class of subject matter generally covered by the quoted phrase, which was charged to be the object of the conspiracy (*United States* v. *Cruikshank*, 92 U. S. 542, 557, 558; *United States* v. *Hess*, 124 U. S. 483; *Hammer* v. *United States*, 134 F. (2d) 592; *Lowenburg* v. *United States*, 156 F. (2d) 22; *Sutton* v. *United States*, 157 F. (2d) 661). The Government in response did not contest the petitioner's view as to the law: its position was that the grand jury intended to charge the defendants with conspiracy to transmit "*any and all* information relating to our national defense" and so, the indictment could not have been more specific (Govt. Br. C. A. 2, pp. 23-4). But the Government's brief did not explain why, if that was what the grand jury had intended to charge, it did not do so.[15]

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[14] See Judge Learned Hand's opinion in *United States* v. *Lekacos*, 151 F. (2d) at p. 172-3; and discussion in this Court, sub. nom *Kotteakos*, 328 U.S. at pp. 754-5; 768-9.

[15] Nor did it explain why the prosecutor had opposed a motion for a bill of particulars, in which request was made that the Government state "what information was the object of the conspiracy intended to be charged in the indictment (R. 13) by the statement under oath that "The facts sought . . . are in essence and by their very nature evidentiary" (R. 16). No facts of an evidentiary character would have been revealed by a

The "*any* and *all*" theory, thus raised for the first time on appeal, but never submitted to the jury as the standard for determining the defendants' guilt, was not only relied upon by the Court of Appeals in upholding the indictment, but also resorted to as providing the singleness of purpose absent from the trial judge's stated criteria suppose to support the trial on a theory of single conspiracy (R. 1665; 195 F. (2d) at p. 601). The result is a denial of justice in conflict with the Fifth and Sixth Amendments,[16] see *Cole* v. *Arkansas*, 333 U. S. 196.

The post trial resort to the "any and all" theory is also an indefensible method of vitiating entirely the protection on which the *Kotteakos* case was intended to afford against the transference of guilt in a conspiracy trial. It could as easily have been said of the defendants in that case that their "common" purpose was to secure fraudulently "any and all" loans from the F.H.A. There has not, indeed, been a case of the *Kotteakos* type, that could not be transformed into a single conspiracy by applying to the "similar" objectives of the alleged conspirators the magic of the

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response that "any and all" information was the object of the conspiracy. The only credible explanation is that the "any and all" concept was invented to meet the exigencies of petitioner's appeal.

[16] An additional and substantial question thus presented is whether an indictment so ambiguous can be sustained on its face. There survives, even in the modern "liberal" practice as to draftsmanship of indictments, the requirement that an indictment be plain enough to protect against double jeopardy (e.g. *Hagner* v. *United States*, 285 U.S. 427, 431; *Berger* v. *United States*, 295 U.S. 78, 82). The actual indictment here, however, gave the prosecutor the choice of whether to prove the subject matter of the conspiracy to be *some* information related to material defense, or *any and all* such information. An acquittal below would not, in the absence of express inclusion of the "any and all" phrase, have prevented a new indictment, based on some national defense information other than that which had been the subject of the trial below. Obviously, apart from the admission subsequently made in the Government's brief in the Court of Appeals, the double jeopardy defense could be answered by the claim that the first indictment intended only to cover the particular information that might have been the subject of the trial under it.

"any and all" phrase. In a petition for rehearing below, we demonstrated how the Court of Appeals itself had at one time, in its own decision on rehearing in *United States* v. *Liss*, 137 F. (2d) 995, 1006, rejected the "any and all" approach, shown by the record in that case to have been pressed upon the Court by the United States Attorney there (Point I of Sobell's Petition for Rehearing, C. A. 2, R. 1702-3).

The majority of the Court of Appeals implies that the existence of the "common end" of transmitting "any and all" information makes inapplicable the ruling in *Kotteakos* because, it says, in that case "each defendant was interested in obtaining his own fraudulent loan only" (R. 1665; 195 F. (2d) at p. 601). This is to stretch beyond the limit of logic a conception of imputed "interest." Common sense rebels at the imputation to petitioner of constructive, acquiescent "knowledge" of atomic espionage by analogy to the imputation to a whiskey salesman of acquiescent knowledge of the activity of another whiskey salesman.[17]

The invention of the nuclear weapon was an event of such transcendent significance as to forbid such a result "The release of atomic energy", said President Truman,[18] "constitutes a new force too revolutionary to consider in the framework of old ideas." Mr. Bernard Baruch said in his opening statement to the United Nations Atomic Energy Commission: "Science has torn from nature a secret so vast

[17] The reference to *Blumenthal*, in the opinion of the Court of Appeals, is based on a serious misconception as to what this Court held there. It was stressed in this Court's opinion that that case involved "special circumstances" (332 U.S. at p. 557) of a different state of proof against two groups of defendants, with respect to what was actually the same transaction the black market sale of a single shipment of whiskey. The "unique facts" in that case (332 U.S. at p. 559) involved evidence admissible against two out of five defendants only, as to the role of an unknown owner; this Court said this difference added "no essential feature" (332 U.S. at p. 557) to the proof against defendants as to whom testimony of his existence was not admissible.

[18] Special Message to Congress, October 3, 1945, 91 Cong. Rec. 9369.

in its potentialities that our minds cower from the terror it creates."[19] Said Professor Brodie: ". . . to speak of it as just another weapon was highly misleading. It was a revolutionary development which altered the basic character of the war itself."[20]

The panoply of military, diplomatic, legislative and administrative measures ushered in with the beginning of the Atomic Age—the very nationalization, in a "free enterprise" country, of atomic energy production[21]—all go to underline the point that "the new physical force was really something different, that it was even a different kind of a difference."[22]

It is this "different kind of a difference" which makes it in any event untenable that atomic secrets should be regarded as so related to other types of information relating to the national defense as to be subject to being embraced by the indiscriminate "any and all" approach. Even if the question had been submitted to them (it never was), could a jury rationally have found that petitioner had shared a "consent to the dominant aim" of a character sufficient to hold him as a co-conspirator with alleged "atom spies," without even knowledge on his part of their activity? Whether or not there was an "implied understanding," as charged, between petitioner and Julius Rosenberg with respect to electronic information, it could not be stretched to extend to such a departure. See quotation from *United States* v. *Peoni*, 100 F. (2d) 401, 403, in the dissenting portion of Judge Frank's opinion (R. 1666; 195 F. (2d) at p. 601) and *United States* v. *Crimmins*, 123 F. (2d) 271, 273:

> "Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in further-

[19] Quoted in Blackett, Fear, War and the Bomb (1949) p. 145.
[20] Brodie, The Absolute Weapon (1946) p. 4.
[21] 42 U.S.C. 1801 et seq.
[22] Brodie, supra, n. 20, p. 4.

ance of the joint venture; but into that must be read the condition that acts so imputed must be done in the execution of the venture as all understand it . . . it is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding."

Judge Frank's Dissent and the Conflict in Circuits

The Court of Appeals passed upon a separate question, in respect of petitioner's contentions as to the *Kotteakos* doctrine, on which its decision is in conflict with the decision of the Court of Appeals for the Third Circuit in *Lefco* v. *United States*, 74 F. (2d) 66, and in principle, in conflict with this court's recent decision in *Morisette* v. *United States*, 342 U. S. 246. The question, which evoked Judge Frank's dissent below, is whether, in a conspiracy trial, where there is a choice of inferences to be made upon the outcome of which it will be determined whether one, or more than one conspiracy was proven, that choice is to be made by the judge or the jury.

The question, apart from the conflict in circuits produced by the decision below, is of obvious importance in the administration of federal criminal justice, where the practice of employment of the conspiracy device, for tactical and strategic advantage has persisted unabated despite intermittent solemn admonitions from appellate judges and justices.

Judge Frank wrote for both the court below, and for himself as dissenting judge, in discussing the point. However, the views he stated on behalf of the judges with whom he disagreed, went only to the question discussed above, as to whether, on this record, a single conspiracy *could* have been found. He did not state why the majority disagreed with him as to his conclusion that the question "should have

been submitted to the jury"[23] (R. 1666; 195 F. (2d) at p. 601).

The Third Circuit wrote in the *Lefco* case:

> "Whether the proofs establish the conspiracy alleged by an indictment or establish several conspiracies not alleged may, however, be a valid question and in such case it is a question of fact for the jury" at p. 69 of 74 F. (2d).

In petitioner's case, as the instructions to the jury disclosed,[24] and as Judge Frank's opinion demonstrates, there was a directed verdict, on the question of whether there were one or more conspiracies. "In effect" said Judge Frank, "he charged that if the jury believed Elitcher's testimony, Sobell was a member of the larger conspiracy charged in the indictment" (R. 1666-7; 195 F. (2d) at p. 601-2).

The silence of the majority of the Circuit Court on this question makes it impossible to understand their basis for viewing the case as one in which "the jury could and did

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[23] Other multiple conspiracy cases—including a decision in the Second Circuit—have seemed to regard the question as one of fact for the jury. *United States* v. *Griffin*, 176 F. (2d) 727, 733 (CCA 3-1949) ("There is ample evidence from which the jury could find that the fraudulent passport operation was but one conspiracy") *United States* v. *Rosenberg*, 150 F. (2d) 788, 773 (Second Circuit) ("Sufficient to justify the jury, in the light of the careful instructions it received from the Court, in finding a close inter-relation between this and the other transaction"). Even in the *Blumenthal* opinion of the Ninth Circuit it was stressed that it was "the jury" that "was justified in inferring that appellants were parties to a single agreement and conspiracy." 158 F. (2d) 883 at p. 888. Indeed, in *United States* v. *Ganey*, 187 (2d) 541, the same United States Attorney who prosecuted petitioner, argued to the Second Circuit that "the jury was justified in inferring that appellants were parties to a single conspiracy." (Govt. Br. C.A. 2, p. 12.)

[24] "Again I want to emphasize that the conspiracy in this case is a conspiracy to obtain secret information pertaining to the national defense and then to transmit it to the Union of Soviet Socialist Republics. It is not a conspiracy to obtain information only about the atom bomb. I point that out because the Government contends that Sobell was in the general conspiracy to obtain information of a secret nature." (R. 1560.)

reasonably find that Sobell consented to the dominant aim, and so became a member of the Rosenberg-Greenglass-Gold conspiracy" (R. 1665-6; 195 F. (2d) at p. 601). The question of "consent" to the dominant aim was taken from the jury by the trial judge. His instructions directed the jurors to find such consent if they believed Elitcher's testimony concerning non-atomic "espionage." But the issue of "consent" to the dominant aim is no different from a question of "intent"; and such a "question of fact . . . must be submitted to the jury." *Morissette* v. *United States*, 342 U. S. 246, 274. The "trial judge may not withdraw or prejudge the issue" (id.).

The instructions given in respect of Sobell's guilt or innocence necessarily withdrew and prejudged the question —the jury was told that if petitioner was guilty of any conspiracy, it was the single, major conspiracy visualized by the trial judge.

> "Had the jury convicted on proper instructions" [it might have been] "the end of the matter. But juries are not bound by what seems unescapable logic to judges" (*Morissette, supra* at p. 376).

The Denial of Particulars and of Opportunity to Move for Severance

The defendant Sobell, petitioner here, was not given any warning of the limited nature of the charge against him by the indictment. He made motion for a bill of particulars (R. 12-14) which was cut down, after reargument (R. 17-24) to a most limited area: (1) the date he was claimed to have joined the conspiracy and (2) whether the government still relied on and intended to prove the overt acts alleged in the original complaint against him, sworn to August 17th, 1950. The answer to the second was in the affirmative (R. 24) and yet at the trial, the prosecution proved none

of these acts. It is most unfair that a defendant should be so misled.

Sobell's petition for rehearing in the Court of Appeals points out, moreover, how the denial of more adequate particulars to him, constituted in itself reversible error (Point III of Sobell's Petition for Rehearing, C. A. 2, R. 1706-8). In the interests of brevity, we respectfully refer to Point III of that petition which went unanswered, except by denial without opinion, by the Court below. As was shown in that petition, if petitioner and his counsel had been adequately apprised, they might have successfully appealed to the discretion of the District Court to grant a severance —even if the conspiracy were "single." The pre-trial rulings on the indictment and request for particulars had the necessary effect of denying opportunity even to seek exercise of discretion.

II. The Prejudicial Evidence as to Political Beliefs

Employment of Evidence of Propensity

Petitioner was on trial for conspiracy to commit espionage on behalf of the Soviet Union, from 1944 to 1950.

Evidence was introduced of his membership in the Communist Party in 1939-1941.[25]

The time of the trial was one of "heated public feeling against Communists."[26] We need add nothing to the observation of the Court of Appeals that "of course, such evidence can be highly inflammatory in a jury trial. This court and others have recognized that the Communist label yields marked ill will for its American wearer" (R. 1655-6; 195 F. (2d) at P. 596).

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[25] Despite solemn representation by the U. S. Attorney that this would be proved up to the date of the conspiracy (R. 199), there was no proof later than 1941.

[26] *United States* v. *Dennis*, 183 F. (2d) 201, 226.

It has, until now, been the "accepted and usual course of judicial proceedings" in the United States and Great Britain, to guard to the utmost against "the deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught". Wigmore, Evidence, Section 57 p. 456. A "fundamental demand for justice and fairness" requires exclusion of evidence of "criminal tendency" *Lovely* v. *United States*, 169 F. (2d) 386, 389. The opinion of the Court of Appeals presents an unaccountable departure from this standard.

The deeply imbedded rule against use of evidence of criminal propensity, tendency or disposition has recently been restated by this Court. *Michelson* v. *United States*, 335 U. S. 469. Such evidence is to be excluded, according to the A. L. I. Model Code of Evidence,—"Where the series of inferences on which the relevance of the evidence depends is from the commission of the other wrong, to a disposition to commit such a wrong . . . thence to the commission of the particular wrong" (Rule 311, Comment).

The Court of Appeals, however, reasoned:

> "But one may reasonably infer that [an American who had expressed devotion to another country's welfare] *is more likely to spy for it than other Americans not similarly devoted.* Hence this attitude bears on a possible motive for his spying or a possible intent to do so when there is other evidence in the case that he did such spying" (R. 1655; 195 F. (2d) at 595) (emph. suppl.).[27]

Evidence which is independently relevant to prove "intent" is not necessarily rendered inadmissible because it

[27] While the Court of Appeals refers here to "motive" or "intent" the trial judge gave the evidence to the jury solely on the issue of intent. (R. 1558.) Cf. *Bollenbach* v. *United States*, 326 U.S. 607; *Cole* v. *Arkansas*, 333 U.S. 196.

also proves disposition or criminal tendency. But evidence of criminal tendency is not made admissible merely by characterizing it as evidence of "intent."[28] Nor is it made admissible because it is limited to showing an ingredient of guilt, rather than guilt *per se*. Evidence of Communist Party membership was not said by the Court to have any significance in relation to "intent" other than its showing of propensity.

The law requires more than this. It requires a showing of logical relevance *apart* from the showing of criminal tendency.[29] The route must be other than via propensity. Relevance independent of criminal tendency is shown, for example, where recurrence will negative a possible claim of mistake or accident (Wigmore, Evidence, Section 242, p. 302). "A forged document has peculiarities which a man handling it can, frequently, readily detect. Hence the mere evidence of his handling other notes is relevant to guilty knowledge quite apart from disposition. On the other hand there is no quality about stolen property, awareness of which on previous occasions will teach a man to recognize

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[28] Compare *Commonwealth* v. *Peay*, 369 Pa. 72, 85 Atl. (2d) 425, where the Supreme Court of Pennsylvania reversed a conviction for assault in a labor dispute, on the ground that evidence of Communist affiliation was incorrectly accepted by the trial court as relevant to "motive".

[29] Even when such evidence is admissible on a ground independent of propensity, it requires more than a "possible" bearing (R. 1655; 195 F. (2d) at p. 595) to justify letting it in. "Greater caution is required," suggests Wigmore (sec. 216, P. 217) "because if we are too liberal or too loose in not exacting an adequate degree of relevancy or probative value for the allowable purposes, we admit evidence whose dominant bearing is a dangerous and forbidden one." This Court has recently recognized that "much evidence of real and substantive probative value goes out on considerations irrelevant to its probative weight but relevant to possible misunderstanding or misuse by the jury." *Brinegar* v. *U. S.*, 338 U.S. 160, 173, and see *Shepard* v. *United States*, 290 U.S. 96, 104.

In respect of the defendants Rosenberg, it was conceded by the prosecutors that evidence of Party membership was a matter "that I might consider not worth occasioning great delay". (R. 416.) Neither was it worth occasioning the "ill will" (R. 1656; 195 F. (2d) at p. 596) engendered for petitioner.

other stolen property on another occasion." *Stone, infra*, 51 Harv. L. Rev. at p. 1002.

The most penetrating analysis of the phase of the rules of evidence with which we are here concerned is found in the articles by Julius Stone on "Exclusion of Similar Fact Evidence", 51 Harv. L. Rev. 988 (American); 46 Harv. L. Rev. 954 (England). His analysis is the basis for the formulation of the applicable rules in the American Law Institute's Model Code of Evidence. His thesis concerning development of a "spurious rule" of exclusion, in which evidence of other wrongs is admitted only when fitting into a pigeon-hole marked "Identity" "Motive" "Intent" and the like, exposes much of the confusion and error in this branch of the law. He described a process which was unwittingly followed by the Court of Appeals below:

> "In the third place the spurious rule becomes even more fruitful of chaos because it has tempted the courts to dispense altogether with the test of relevance. The mental process behind this is rarely explicit, but it may be stated somewhat as follows: 'An exception to the general rule of exclusion is where the other offenses are put in "to show intent". Here the prosecution offers to put in such evidence to show intent. Hence the evidence is admissible.' Obviously, what has happened here is that the meaning of 'to show intent' has changed from 'relevant to show intent' to 'for the purpose of showing intent' . . . all that such evidence is then relevant to, is the evil disposition of the accused, and, behold, the bottom has dropped entirely out of this branch of the law" (at p. 1007 of 51 Harv. L. Rev.).

The only route discovered by the Court of Appeals, via which it could find evidence of Communist Party membership to be relevant to show "intent", was by way of the fact that it showed disposition; "more likely to spy for it". "But when the prior crime has no other relevance than

that, it is inadmissible." *Boyer* v. *United States*, 132 F. (2d) 12, 13. The inquiry must always be: "Is the evidence in any way relevant to a fact in issue otherwise than by merely showing propensity?" *Stone*, *supra*, 51 Harv. L. Rev. at p. 1004; see also pp. 1005, 1008, 46 Harv. L. Rev. at p. 966 and *passim*. Dr. Stone cites the "great case" of *Makin* v. *Attorney General of New South Wales* (1894), A. C. 57, as establishing "a broad rule of admissibility where there is relevance, except where the only relevance is *via* disposition" (46 Harv. L. Rev. at p. 975):

> "It is certainly 'more probable' that a crooked official did steal than if he were an upright one. Yet our law forbids these very premises." *Railton* v. *United States*, 127 F. (2d) 691, 693.

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The serious error—and dangerous precedent—which would be left undisturbed, if this Court did not review the decision below is so manifest, as, we think, not to require further exposition for the purposes of a petition for certiorari.[30] But apart from the palpable error of the Court of Appeals, in accepting evidence of propensity as competent to show intent, the political evidence which permeates this record came in in a manner in conflict with settled principles and decisions of this Court.

Misapplication of the Haupt Decision

In Haupt's treason trial, evidence of statements that "after the war he intended to return to Germany, that the

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[30] The error is the more perplexing in the light of the realities involved in the case tried below. "Intent" was not an issue presenting difficulty to the prosecution if the acts charged had been proved by substantial evidence. Espionage is a crime of the sort where it is difficult to conceive of a factual situation where the intent to aid a foreign country could not be inferred from participation in the transmission of secret information to it. The political evidence ostensibly offered to show intent had preponderantly a prejudicial purpose.

United States was going to be defeated, that he would never permit his boy to join the American army, that he would kill his son before he would send him to fight Germany" (330 U. S. at p. 642) and that if war came and he were taken into the Army, "he would crawl over to the enemy lines and tell them our position" (152 F. (2d) 791-2) were "admissible on the question of intent and adherence to the enemy" (330 U. S. at p. 642).

The prosecutor offered (R. 414), and the trial judge accepted, as did the Court of Appeals, this Court's decision in *Haupt* as justifying admission of the sort of testimony given against this petitioner. But there is a vast difference between Haupt's statements, and petitioner's, as testified to by Elitcher (R. 226, 227, 229). (See p. 8, *supra*.) If the "worst" that can be said about petitioner's alleged period of membership in the Communist Party was that he urged political support of the German-Soviet non-aggression pact (a matter of public controversy on which reasonable men could differ) [31] does not the case come within the cautionary admonition of this Court in *Haupt:* "Such testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our government or quite proper appreciation of the land of birth." So far did the trial judge disregard this admonition, that the prosecution was permitted, in respect of a co-defendant, to introduce a collection can marked "Save a Spanish Republican Child" (R. 1177).

If the result below is left undisturbed, a sanction of a most ominous character (as well as retrospective retribution of a repugnant sort) will be allowed in respect of ex-

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[31] David Lloyd George (N. Y. Times Oct. 22, 1939, P. 35), Ambassador Davies' Mission to Moscow, (1941, pp. 453-6) and Mr. Henry Luce's Life Magazine (Vol. 14, No. 13, P. 20) expressed views not dissimilar to petitioner's.

pressions of opinion and lawful activity tinged with a left wing character—or which may have happened to coincide with opinion and activity of a left wing character. It does not require a multiplicity of "spy trials" and death sentences to have the effect—a calculated effect, perhaps—of helping to impose right wing orthodoxy of thought, opinion and political action on men apprehensive that evidence of non-conformity will be employed as evidence of disposition (and "hence" intention) to commit espionage.

Bentley: "Res Inter Alios Acta"

The question of logical relevance—which the Court of Appeals answered in terms of propensity—was confused by the trial judge with the question of circumstantial connection. The former question is for the judge to decide; only the latter for the jury. The question whether the purported evidence of "intent" was logically relevant to a material issue depends on whether the evidence did in fact "relate to an occasion which is near enough in kind to be rationally probative," *United States* v. *Walker*, 176 F. (2d) 564, 566; "The judge must decide each time whether the other instance or instances form a basis for sound inference as to the guilty knowledge of the accused in the transaction under inquiry" *United States* v. *Brand*, 79 F. (2d) 605, 606. But here, instead of excluding the evidence of Communist Party membership on the ground that he himself perceived no relation between it and any issue in the case (he was unable to say that he saw any (R. 199-200)), the judge decided to delegate the question to the jury and thereby invited the testimony of Bentley.

The ancient phrase "res inter alios acta" could not be better illustrated than by what then occurred. Three defendants, on trial for their lives, were forced to sit through a recital by an individual whom they did not know of

stupendous misconduct in which they had no part. The confusion was confounded by the fact that the narrator was a notorious public figure who "has made her accusations so lavishly". Were petitioner's counsel obliged to face the dilemma of either allowing her tale to go unrefuted or turning the trial into a three ring circus in an effort to refute it? Would defense counsel have been permitted—if they dared—to assume the defense of Bentley's "twenty" or "thirty" sources?

There could not have been a better demonstration of why the question of admissibility should, in this case above all, have been decided by the judge and by him alone. If he felt it necessary—and if it is ever permissible—to get expert opinion on the question of logical relevance, it should have been done in the absence of the jury. An exclusionary rule and policy prompted by the necessity of keeping from the jury information as to matters which would sway the jurors too much is destroyed altogether if the jury itself is to pass upon whether the exclusionary rule should be applied, or whether there is sufficient logical relevance shown to overcome it.

Association and Imputation

Bentley did not furnish information from which the tribunal could determine what was the "intent" of the perhaps one hundred thousand Americans who may have joined the Communist Party at one time or another for periods of varying duration. She did not even show that her own intention was to confer a military advantage on the Soviet Union—yet that was the statutory intent in proof of which her evidence went to the jury (R. 1558). She testified to "facts" (if her melange of gossip, rumor and hearsay may be so dignified) [33] which might support the inference that

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[32] Book Review—New York Times, Sept. 23, 1951.

[33] I.E. Would her testimony that the Party was part of the Communist International after its disaffiliation, and that body's dissolution, (R. 976-7,

some members of the Party might have had a disposition to aid the Soviet Union. But could such evidence be binding upon or even admissible against one such as petitioner, who was not shown to have acquiesced in, nor even to have any knowledge of, the characteristics of party membership as she described them?

The intent, the purpose, the state of mind of the many different individuals who joined the Communist Party was as variable as their own character and background. Some may have joined because it called meetings to support labor's claims (*cf. DeJonge* v. *Oregon*, 299 U. S. 353), others because of racial discrimination and oppression (*cf. Herndon* v. *Lowry*, 301 U. S. 242). Others may have joined because of a belief that in so doing they would combat fascism most effectively, or because of acceptance of a socialist ideal, or even because they viewed the Party as an effective instrument of social reform. In some instances, adherence may not have been a response to the Party's propaganda, emotional disturbance, sibling rivalry, and similar factors are said to have led some to join. See, *e.g.*, discussion at New York Herald Tribune Forum, "Why Do Americans Become Communists", Oct. 28, 1951, Section 9, pp. 50 ff.

The "intent" which was sought to be established was of course something personal to petitioner. "Guilt with us remains individual and personal even as respects conspiracies," *Kotteakos* v. *United States*, *supra* at p. 772. Is this less true of guilty intent? If "under our traditions beliefs are personal and not a matter of mere association," *Schneiderman* v. *United States*, 320 U. S. 118, 136, Bentley's testimony was not admissible against petitioner. And see *Knauer* v. *United States*, 328 U. S. 654, 669.

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983 (I) have been admissible in a prosecution for failure to register under the Foreign Agents Registration Act? 22 U.S.C. 611, *et seq.* There has been no such prosecution despite her availability.

III. Other Evidentiary Rulings of General Importance

Improper Use of So-called "Flight" Evidence

Obviously, the presence of a defendant at a place outside the jurisdiction of the court is not, without more, evidence of flight. There must be a basis for inference of a purpose to evade arrest or questioning before it can become a rational inference that his presence elsewhere indicates consciousness of guilt. The Court below, however, admitted evidence of petitioner's trip to Mexico, without requiring proof of guilty motive for departure. It did not, moreover, in instructing the jury, permit them to regard petitioner's trip as other than "evidence of flight" (R. 1559-60).

The vice of the procedure followed at the trial has been recognized by the New York Court of Appeals:

> "Flight from justice may be indicative of consciousness of guilt, but departure from the State is not always dictated by impulse or purpose to escape the consequence of acts done or charges that may be brought . . . guilty motive for the departure must be present before the departure can become a relevant factor in the determination of guilt." *People v. Stillman*, 244 N. Y. 196, 199.

Government counsel stated below, with respect to our point concerning the necessity for proof of guilty motive for departure, "we know of no such doctrine in the federal courts" (Gov't Br., C. A., p. 28). Their brief was dated Jan. 5, 1952. Yet Hon. Sylvester Ryan, United States District Judge for the Southern District of New York, wrote on December 19, 1951, in a case in which two of the Assistant United States Attorneys who signed the brief below were of counsel: "evidence of flight is 'ordinarily of slight value, and of none whatever unless there are facts pointing to the motive which prompted it' "; *United States v. Hall*, 101 F. Supp. 666, 672.

Improper Introduction of the "Deported" Card

1. In the popular mind "deportation" is commonly understood to mean "the sending back of an undesirable or criminal alien to the country whence he came."[34] There was no purpose for the introduction of the "deported from Mexico" card against petitioner, save to arouse the suspicion against him that he had engaged in criminal or immoral conduct in Mexico. No ground of relevance was stated. The afterthought accepted by the Court of Appeals (to rebut a claim of voluntary return) cannot justify admission of the card, since it was never stated at the trial or so given to the jury.

2. The card was in any case inadmissible as hearsay, not entitled to the dignity of a "business entry" (28 U. S. C. 1732). The entrant was present to testify and admitted on *voir dire* that his source for the statement was *not* the Mexican authorities (R. 1027, 1028), *nor* any document (R. 1036), yet the source claimed for the entry was "observation" (R. 1027). Deportation is evidenced by an order or decree or official statement, not by conduct. Could one testify—or make an "entry"—stating that another was convicted of crime, merely from observing him enter a penitentiary? Cf. *Clainos* v. *United States*, 163 F. (2d) 593; see also, *United States* v. *Grayson*, 166 F. (2d) 863, 869, "The statute did not mean to make competent whatever the entrant picked up from random sources." Moreover, the entry was made *post motem litam* by a representative of the very agency that had custody of petitioner for purposes of this very trial (R. 1034, 1037). Cf. *Palmer* v. *Hoffman*, 318 U. S. 109.

3. The evil character of what transpired is compounded by the fact that the prosecutor must have known that there would have been a wholly false implication in any sugges-

[34] Funk and Wagnalls, New Standard Dictionary.

tion that it was necessary to "deport" petitioner in order to bring him here, or that he had refused to return voluntarily. The prosecutor knew (cf. R. 1030, 1031, 1034) that petitioner had been assaulted and forcibly taken to the border by or at the procurement of an agency sworn to protect his person from violation of law, without notice, warning, invitation to return, or request that he waive extradition; that is to say, without having been permitted to exercise his volition.

IV. The Absence of Substantial Evidence Against This Petitioner

The recital by the Court of Appeals of the evidence against petitioner contains a statement wholly unsupported by the record: "According to the government's witnesses, Sobell, a college classmate of Rosenberg's suggested to Rosenberg that Elitcher would be a good source of espionage information" (R. 1643; 195 F. (2d) at p. 589). No witness testified to this and the record affirmatively shows that it was pure surmise, conceded to be such by the United States Attorney in summation (R. 1532). The balance of Elitcher's story, excluding matter not initially admissible against petitioner [35] fails to support a verdict of guilty.

The question of the sufficiency of the evidence against petitioner is raised particularly by the peculiar character of Elitcher's testimony. We cannot argue here that he should not have been believed; we suggest that he testified to so little of substance, and so much by way of conclusion, that the case against petitioner never should have gone to the jury.

His testimony is permeated with a curious quality. It

[35] The Court of Appeals exaggerated the import of a statement, not admissible against petitioner, that he had been "helping" (R. 237). This the Court transmutes into "According to Julius he regularly delivered information for transmittal to Russia." (R. 1643; 195 F. (2d) at p. 589.)

is a quality of conclusory condemnation that betokens not the Anglo-American development of facts by interrogation, but the shortcut to guilt employed in a propaganda trial. Early in his direct examination, the following question and answer appeared, the very first relating to petitioner's culpability:

> "Q. Now at this time in 1947, when you visited this Reeves plant where Sobell was employed, did you have a conversation with him or did he have a conversation with you regarding Soviet espionage?
> A. Yes" (R. 210).

This method of using a witness as a sort of rubber stamp, a one-man congregation who supplies no facts but says "amen," is quite consistent with the use of a nominally judicial proceeding to achieve a political objective. But it is not consistent with a search for truth to by-pass facts in favor of conclusions.

Stripped of the wholly conclusory references to the "espionage business" the testimony against petitioner is of a scientist making innocuous inquiries of a fellow-scientist. It is only by the witness' prior acquiescence to the prosecutor's lead, and his "impression" that it had to do with the "espionage business" that what was in itself meaningless becomes damning. To this is added an incident of an abnormal character—the late evening ride to the Rosenberg apartment with a can, said by Elitcher to have been said by Sobell, to contain "valuable information." It is significant that this single equivocal incident was not mentioned by Elitcher the first time he testified before the Grand Jury (R. 341). Despite the fact that he had consulted a lawyer and "decided I would tell the whole complete story" (R. 339, 295) it was not part of the story he told the special agents of the F. B. I. (R. 331) during his first, ten-hour (R. 388-9) interrogation.

The story is full of incongruous details and circumstances and bears earmarks of having been invented. In any case, what did it mean? Proof was required to be made beyond a reasonable doubt of petitioner's participation in (1) an agreement to transmit secret information, (2) relating to the national defense, (3) to the U. S. S. R. or an agent thereof, (4) with intent and reason to believe that it would be used to its advantage.

Speculation cannot supply the place of proof. *Moore* v. *Ches. & Ohio R. Co.*, 340 U. S. 573, 578. The number of inferences and assumptions that have to be made, in order to spell out the necessary ingredients of guilt is so great that the case should not have been permitted to go to the jury.

Although the Court of Appeals affirmed the conviction, a passage in its opinion virtually confirms our point. In discussing the evidence, the opinion states that if the testimony of the "self-confessed spies" were disregarded, "the conviction could not stand" (R. 1648; 195 F. (2d) at p. 592). The self-confessed spies referred to at this point were the Greenglasses; the only others who testified were Gold, and perhaps Bentley. None of these gave any evidence connecting petitioner with a conspiracy. To say that the conviction could not stand, if based on the testimony of Elitcher plus all other non-spies is to say that petitioner's conviction was not supported by evidence sufficient to withstand appellate review. Even if, in this passage, the Court was addressing itself only to the evidence against the Rosenbergs, the result is the same: If Rosenberg's conviction "could not stand" on Elitcher's flimsy story, how could this petitioner's?

V. Reliance on Certain Points More Fully Discussed in the Petition in No. 111, This Term

Evasion of the Treason Clause of the Constitution

The question of the effect of the employment by prosecutor and judge alike of the characterization of "treason" as describing the offense with which defendants were charged is one as to which petitioner takes a joint position with his co-defendants, who will be petitioners herein in No. 111, this Term. Petitioner, in the interests of brevity and convenience, respectfully begs leave to incorporate herein, and rely upon the discussion of such point in that petition (No. 3 of "Questions Presented" in that petition, discussed at pages 27-30 therein).

Its availability to petitioner is the more striking in that but a single witness, Elitcher, testified against petitioner, with respect to any conceivable event which might be regarded as an "overt act." Moreover, none of the overt acts charged in the indictment relate to conduct of this petitioner, or refer to him.

Effect of the Trial Judge's Conduct

As stated above, p. 10, note 6, this petitioner takes a joint position with his co-defendants, petitioners here in No. 111, this Term, on the claim of prejudicial misconduct of the trial judge, and joins in the appendix to their petition particularizing such conduct as well as the portion of their petition discussing it (No. 4 of "Questions Presented" in that petition, discussed at pages 31-39 therein).

Constitutionality of the Statute and Sufficiency of the Indictment

The question as to the constitutionality of the statute under which the indictment was drawn, and the validity of the indictment under the statute as construed, is one on which petitioner takes a joint position with his co-defend-

ants who will be petitioners herein No. 111, this Term. Petitioner, in the interests of brevity and convenience, respectfully begs leave to incorporate herein, and rely upon the discussion of such point in that petition (Nos. 1 and 2 of "Questions Presented" in that petition, discussed at pages 19-27 therein).

VI. Kidnaping and the Motion in Arrest

This Court has, subsequent to the decision below, adhered, in *Frisbie* v. *Collins*, 342 U. S. 519 (March 10, 1952), to the doctrine of *Ker* v. *Illinois*, 119 U. S. 436. It did not have occasion, however, to pass upon the question left open by the *Ker* case, and which it has never decided, as to the effect of kidnaping from a foreign country by Federal officials, or at their instigation for the purpose of trial in a *federal* court.

It is particularly when, as claimed here, such kidnaping may have been in violation of international law, that questions are presented for a national tribunal which are not answered by *Frisbie*. Completely different considerations apply to international rendition, as distinguished from interstate rendition, *Lascelles* v. *Georgia*, 148 U. S. 537, 542-3. The dictum that a court will not be concerned with how a defendant is brought before it is hence belied by *United States* v. *Rauscher*, 119 U. S. 407 (trial after extradition on a different offense than that named in warrant) and *Cook* v. *United States*, 288 U. S. 102 (failure of jurisdiction when seizure is in violation of international law).

The facts claimed involve violations of the United States Code, because as the United States Attorney said, "The F.B.I. caught up with him and brought him back and you have him here" (R. 1534). Correspondence with foreign nations and "matters respecting foreign affairs" are entrusted to the State Department, 5 U. S. C., Sec. 156; others who communicate with a foreign government to influence its conduct in a matter that may be the subject of dispute or

controversy with this country are guilty of a felony, 18 U. S. C., Sec. 983. The procurement of the return of individuals, whether by right, under extradition treaties, or as a favor, independent of such treaties, is a part of the subject matter of "friendly international relationships." *Factor* v. *Laubenheimer*, 290 U. S. 276, 298.

The powers of arrest of agents of the F.B.I. are confined to our territory by a rule of construction, required by international law. If a hearing were to disclose either that they invaded Mexico as the literal meaning of the prosecutor's statement (R. 1534) would imply or that Mexican individuals (or officials) acted on their behalf in beating and kidnaping petitioner, there was a violation of Mexican territorial sovereignty by their conduct.

The result would be an absence of power, *ab initio*, and could not be ratified by service of process after petitioner's arrival here, *Cook* v. *United States, supra*.

Apart from the violation of Mexican sovereignty, there was lawless usurpation of the foreign affairs functions entrusted to the State Department, on the facts indicated in this record. The *Ker* case left open a question that should, in the light of *McNabb* v. *United States*, 318 U. S. 332, be answered differently in respect of the responsibility of this Court for administration of federal criminal justice, a responsibility for maintaining "civilized standards of procedure." Consideration of self-limiting policy in reviewing *state action* (*cf. Ker* and *Frisbie*) are "wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts" (318 U. S. at pp. 340, 341).

The Court of Appeals declined to decide the point (R. 1668; 195 F. (2d) at pp. 602-3). Instead it held that it had been "waived" by the petitioner. Such a harsh result is not understandable in view of petitioner's reliance, in the form of procedure employed—motion in arrest of judgment—on

United States v. *Rauscher, supra.* And the Court did not attempt to reconcile its decision with this Court's holding in *Cook* that an objection of want of jurisdiction based on the violation of international law there involved was not "lost by entry of an answer to the merits" (288 U. S. at p. 122).

Conclusion

It is respectfully prayed that this petition for a writ of certiorari to review the judgment of the court below should be granted.

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